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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DOUGLAS E. YEO, INDIVIDUALLY AND ON BEHALF OF HIS CHILDREN AND AS CHAIRMAN OF THE LEXINGTON PARENTS INFORMATION NETWORK,

Petitioners,

v.

TOWN OF LEXINGTON, JEFFREY YOUNG, SUPERINTENDENT, DAVID WILSON, PRINCIPAL, SAMUEL KAFRISSEN, KAREN MECHEM, AND JOSEPH DINI, CHAIRMAN, JOHN OBERTEUFFER, LOIS COIT, SUSAN ELBERGER AND BARRIE PELTZ, INDIVIDUALLY AND AS THEY ARE MEMBERS OF THE LEXINGTON SCHOOL COMMITTEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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March 6, 1998

QUESTION PRESENTED

Whether the decision not to publish an abstinence advertisement, made by a public high school's publicly funded newspaper and yearbook, bearing the imprimatur of the school, influenced and facilitated by school officials and in accordance with the school's official condom distribution policy, amounts to "state action" within the meaning of the First and Fourteenth Amendments.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Douglas E. Yeo, Individually and on behalf of His Children and as Chairman of the Lexington Parents information Network (LEXNET), respectfully prays that a writ

of certiorari issue to review the judgment entered by the United States Court of Appeals for the First Circuit on December 9, 1997.

OPINIONS BELOW

Petitioner seeks review of the Judgment and Opinion of the United States Court of Appeals, First Circuit, in the case of *Douglas E. Yeo* v. *Town of Lexington et al.*, No. 96-1623 (*en banc*) (December 9, 1997), 131 F.3d 241 (attached hereto as Appendix C, 105a ff.). That Opinion replaced the panel Opinion in the same case (June 6, 1997) (unpublished), 1997 WL 292173 (attached hereto as Appendix B, 2la ff.), which had originally reversed the Memorandum and Order of the United States District Court for the District of Massachusetts in Civil Action No. 94-10811-RGS (April 22, 1996) (unpublished) (attached hereto as Appendix A, 1a ff.).

STATEMENT OF JURISDICTION

The *en banc* judgment of the United States Court of Appeals, First Circuit, was entered on December 9, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

U.S. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves portions of the First and Fourteenth Amendments to the Constitution:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

U.S. Constitution Amendment I

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

U.S. Constitution Amendment XIV, Section 1

The case implicates the following statutory provisions:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ."

42 U.S.C. § 1983

> "The right of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder within the school. Freedom of expression shall include without limitation, the rights and responsibilities of students, collectively and individually, . . . to write, publish and disseminate their views. . . . No expression made by students in the exercise of such rights shall be deemed to be an expression of school policy and no school officials shall be held responsible in any civil or criminal action for any expression made or published by the students."

Mass. Gen. Laws c. 71, § 82

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, and under 28 U.S.C. § 1343 (federal civil rights jurisdiction) and 28 U.S.C. § 2201 (Declaratory Judgment Act). Petitioner, Douglas E. Yeo, a parent of Lexington public High School students, brought suit under 42 U.S.C. § 1983, alleging that the Town of Lexington, members of the Town School Committee, the Superintendent, Principal and faculty advisors violated his rights to free speech and equal protection under the U.S.

Constitution. Petitioner sought declaratory and injunctive relief, as well as compensatory damages. At issue was the refusal of both the High School newspaper and the High School yearbook to print paid advertisements submitted by Yeo promoting sexual abstinence.

The background of the dispute is significant and important to the analysis of state action and acting "under color of state law." In 1992, Samuel Kafrissen, one of the respondents who was faculty advisor to the *Musket,* the Lexington Public High School newspaper, was a member of the LHS Student/Faculty Senate, which had recommended the condom distribution program to the Lexington School Committee. (*Yeo* panel opinion at App. 24a.) The *en banc* opinion summarizes what followed:

> In 1992, the Lexington School Committee adopted a policy making condoms available to students at LHS without parental permission. This measure was the subject of political controversy in Lexington, and Douglas Yeo, a town resident and parent, emerged as a leading opponent of condom distribution and other "safe sex" policies. Yeo headed a group called "Lexington Citizens for Responsible School Policy," which sponsored a non-binding town-wide referendum on the School Committee's condom policy.

Yeo v. *Town of Lexington,* 131 F.3d 241, 244-45 (1st Cir. 1997). The *Musket* had been highly critical of Yeo and ran both news articles and editorials on the policy and the refer-

endum in several issues during the winter and spring of the 1992-93 school year.[1] Yeo thought these articles misrepresented his group's position. In January 1993, Yeo requested a meeting with LHS Principal David Wilson concerning his grievance. Wilson suggested that Yeo submit a letter to the editor correcting the alleged inaccuracies, but advised Yeo that any decisions regarding corrections would have to be made by the student editors. Yeo decided not to submit a letter to the editor.

In March 1993, the voters of Lexington approved the condom distribution policy.

> Subsequently, in May 1993, Yeo founded the Lexington Parents Information Network ("LEXNET"). LEXNET's stated goal was to

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[1] The *Musket* staff was extremely upset because they were furnished with a set of stringent restrictions, prepared by the Lexington Town Counsel, on what the *Musket* could and could not print regarding the condom ballot question after the Office of Campaign and Political Finance was contacted and consulted. It was explained to the *Musket* by Town Counsel that the same restrictions instituted against a public official could also be instituted against a student newspaper if that paper was funded in any way by public funds. In an unsigned *Musket* editorial dated March 15, 1993 entitled "This Censorship Must Stop," the students admitted that they received a directive from the administration of the school on what to print (Kafrissen Deposition Ex. 2). Furthermore, the students expressed outrage at the official Lexington High School policy interfering with the content of the *Musket*. Among other things, the students stated in their editorial, "It was in response to the *Hazelwood* decision that the Massachusetts legislature passed [G]eneral [L]aw 71:82, to shield student publications in this state from the broad restrictive powers allowed school administrators under *Hazelwood*." (*Id.*)

distribute information about public education to parents via newsletters and meetings.

On November 1, 1993, Yeo, as Chairman of LEXNET, submitted a full page ad to the 1994 LHS Yearbook. The ad copy read:

We know you can do it!
ABSTINENCE: The Healthy Choice
Sponsored by: Lexington Parents Information Network(LEXNET)
Post Office Box 513, Lexington
Massachusetts 02173.

The ad was accompanied by a check for $200.00.

Mechem, the Yearbook advisor, acknowledged receipt of the check and placed the ad in a drawer without giving it a second thought.

Yeo, 131 F.3d at 244-45. It was never represented to Yeo that the ad, once submitted, and the check accepted, could later be rejected. While the abstinence ad was in a drawer with other ads, awaiting submission to the publisher for the printing of proofs, Natalie Berger, a senior and co-editor-in-chief, noticed the ad and felt that the ad was "out of context" with the advertising section of the Yearbook. Nevertheless, the ad was submitted to the publisher for proof.

> Yeo submitted a similar advertisement to the Lexington High School newspaper, the *Musket*. On January 3, 1994, Yeo wrote to Dong Shen, a senior and the business manager of the Musket, requesting information about advertising procedures and rates . . . Receiving no reply, Yeo wrote to Shen again on January 20, requesting the information "as soon as possible," and copying Ivan Chan, the editor-in-chief, on the letter.
>
> On January 25, Shen wrote to Yeo, providing the requested information and taking full personal responsibility for the delayed response. Shen concluded by noting, "Of course ads are still subject to the approval of the editorial board."
>
> On February 1, 1994, Yeo submitted an ad to the Musket. The text was identical to the Yearbook ad previously submitted, except that, above LEXNET's address, it contained the line: "For accurate information on abstinence, safer sex and condoms, contact: [LEXNET]."

Yeo, 131 F.3d at 245.

PUBLICATIONS

The Yearbook operation consisted of about sixty students. In 1993-94, Dow-Chung Chi and Natalie Berger were the co-editors in chief, and Karen Mechem had been the faculty ad-

visor since 1983. The School Committee paid Mechem a stipend of approximately $2,000.00 a year for supervising the Yearbook and advising the students involved in the project. Mechem was charged with training the student editors in the technical issues involved in publishing a Yearbook. (Mechem Deposition at 8.) Additionally, she made herself available to provide guidance upon request. In addition to Mechem's stipend, the Yearbook received free use of the school's facilities. However, it met its other costs from sales to students and advertising,

The Yearbook contained sections of student pictures, sports and academics, and advertisements. The advertisement section was comprised mostly of congratulatory ads purchased by students and families. Some local businesses familiar to the students purchased advertising space in the Yearbook. There were no written guidelines established for the acceptance or denial of submitted advertisements. However, the Yearbook had an "unwritten policy" of not publishing political or advocacy advertisements.

The *Musket* is a student-written and edited newspaper that is published several times a year. In 1993-94, Ivan Chan was the *Musket's* editor-in-chief, Dong Shen was the business manager and Samuel Kafrissen had been the faculty advisor for eighteen years. Kafrissen was given a stipend of $1,373.00 per year for supervising the *Musket* and advising the students involved in the project. Kafrissen was a resource whose mission was to facilitate the students' learning experience as well as the successful publication of the newspaper. (Kafrissen Affidavit, ¶ 7.) The *Musket* received $4,500.00 a year from the School Committee to fund its operations. The *Musket* is allowed to use the Lexington High School name on its masthead and has a mailbox at the school, though there is

no specific office for it. The *Musket* usually includes news articles, editorials, letters to the editor, sports coverage and humor columns. Some editions of the *Musket* contain an advertising section.

In 1993-94, there were no written guidelines established for the acceptance or denial of submitted *Musket* advertisements. However, that year, the *Musket* had an "unwritten policy" of not publishing political or advocacy advertisements. The Musket had an "advertising form" for potential advertisers. This form gave local businesses and non-profit organizations the opportunity to submit ads to the *Musket*. The form stated that depending on the issue and ad size, some ads might have to be edited or adjusted for length. The form also stated that payment for the ad would be accepted after the ad was published.

YEARBOOK

In January 1994, the student editors of the Yearbook, at an editorial meeting, decided that Yeo's ad was a political advocacy statement that was inappropriate for the Yearbook. On February 1, 1994, Mechem contacted Yeo and, despite her own admission that she did not tell Yeo that she was acting on behalf of the students, notified Yeo of the Yearbook's decision not to run the ad as drafted. (Mechem Deposition at 66.) Mechem requested that Yeo rewrite the ad as a congratulatory graduation message. Yeo refused to revise the ad and demanded that his ad be published as submitted.

After Mechem's involvement in advising Yeo to redraft, the student editors discussed the issue again. Mechem had initiated contact with the Student Press Law Association in

Washington, D.C., in order to determine whether the ad could legally be rejected (Mechem Deposition at 86.) On February 4, 1994, Mechem returned Yeo's check and informed him that the Yearbook would not print his ad because of the non-confrontational nature of the advertising section of the Yearbook. The students did not interact directly with Yeo concerning the rejection of his ad.

On February 13, 1994, Yeo replied by fax that based on LEXNET's understanding of the right to equal access and free speech, it did not accept the Yearbook's refusal to print the ad. He asked the Yearbook to reconsider printing the ad. No further consideration was extended to him.

MUSKET

In mid-February, 1994, after the rejection of Yeo's ad in the Yearbook, and after discussing the ad, the student editors of the *Musket* decided that Yeo's ad constituted a political statement. On February 24, 1994, Shen, the *Musket's* business manager, wrote a letter to Yeo indicating that the advertising space in the *Musket* was not a public forum, and that the *Musket* reserves the right to accept and reject ads.

The following week, Principal Wilson informed Kafrissen that Lexington Town Counsel, Normen Cohen, had been contacted by Yeo's attorney. Town Counsel urged the school to publish Yeo's ad. Kafrissen and Wilson agreed to examine the legal issues and discuss the matter with the students.

On March 1, 1994, the student editors and Kafrissen discussed the printing of Yeo's ad. After this meeting, Kafrissen invited Yeo to express his views in a "letter to the editor" rather than a paid advertisement.

That same day, Yeo met with Principal Wilson to discuss the ads in both publications. In the meeting, Wilson told Yeo that the Town Counsel had advised publication of the ads. Yeo believes that Wilson assured him that the ads would be printed, something Wilson denies. In any event, Wilson accepted the uncashed check for $200.00 that Yeo originally submitted with the ad to the Yearbook.

On March 7, 1994, Yeo declined Kafrissen's invitation to write a letter to the editor. Yeo felt that he could make his point better in an ad, rather than in a letter to the editor. Yeo reaffirmed his right to have the ad published in the *Musket.*

On March 11, 1994, Superintendent Young convened a meeting of the respective chief editors and faculty advisors of the Yearbook and *Musket* along with Principal Wilson to discuss the dispute. Young concluded the meeting by stating that he would like to do further research and obtain legal advice on the issue.

On March 13, 1994, Chan held a meeting of the entire *Musket* staff, with the exception of Kafrissen. In that meeting the student staff voted to reject publication of Yeo's ad.

On March 18, 1994, Superintendent Young convened a second meeting which included Mechem, Kafrissen and some members of the School Committee. In this meeting the student editors informed Young that they did not want the ad. The school officials and School Committee members present discussed legal issues and the possibility of legal proceedings to address Yeo's claims. However, in the end, they supported the exclusion of the ads, which they believe was the students' decision.

Following the March 18th meeting, the *Musket* decided not to run Yeo's ad as a matter of "policy." The Yearbook invited Yeo to discuss alternatives to the submitted ad, an

offer which he declined. By April 11, 1994, both the Yearbook and the *Musket* had not printed Yeo's ads and with the support of Mechem, Kafrissen, Wilson, Young, and various School Committee members.

PROCEDURAL HISTORY

In April, 1994, Yeo filed this suit in federal district court. Defendants moved for summary judgment on various grounds, including the lack of state action. The district court (Stearns, J.) granted summary judgment to the defendants on April 22, 1996 on the state action issue and did not reach the other grounds. A panel of the First Circuit (Lynch, J., dissenting), reversed on June 6, 1997, holding that summary judgment should be entered for Yeo on his claims that there was state action, that the advertising section of each student publication was a limited public forum, and that the decisions not to publish were impermissible viewpoint discrimination. *Yeo*, 1997 WL 292173 (1st Cir. June 6, 1997). The panel opinion by Judge Stahl used this Court's seminal decision in *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), to consider the relationship between Lexington High School and the two school publications in question.

> [S]chool-paid faculty members supervised both the Musket and the Yearbook, and both publications were, as the town defendants admit, at least partly designed to impart knowledge about journalism and publishing to the student participants. . . . On these facts,

> *Hazelwood* instructs that both the Musket and the Yearbook "may fairly be characterized as part of the school curriculum." . . . 494 U.S. at 271, 108 S.Ct. at 570. Indeed, "it is not at all unlikely that members of the public, parents of school children in particular, might reasonably perceive school-sponsored publications to bear the imprimatur of the school." *Planned Parenthood of Southern Nev., Inc.* v. *Clark County Sch. Dist.*, 941 F.2d 817, 828 (9th Cir. 1991) (en banc).

Yeo, 1997 WL 292173, *6.

The First Circuit granted *en banc* review and withdrew the panel opinion. The *en banc* court, in an opinion written by Judge Lynch, affirmed the district court decision entering summary judgment for defendants on the ground that state action had not been shown. Judge Stahl concurred in the judgment, while remaining "persuaded that, on the facts of this case, the student editors were public actors acting under color of state law." *Yeo,* 131 F.3d at 256. (Stahl, J., concurring). "[T]o the extent public school students solicit funds to support a public enterprise in their capacities as officials of that enterprise, they act under color of state law." *Id.* at 259.

REASONS FOR GRANTING THE WRIT

This case involves a decision made by public school officials to support, in accordance with official school policy regarding condom availability, the rejection of a paid adver-

tisement urging sexual abstinence. While the First Circuit ruled that students of minority age were the ultimate decisionmakers and that they were presumably private actors, not state actors, these decisions were communicated to petitioner by public school officials. In addition to such critical communications with Yeo, these state actors, on behalf of minority aged students, negotiated, held funds, accepted checks, refunded checks, sought legal advice, and generally provided advice and experience to students involved in these publications. The intertwining of public and private factors in advertisement decisions of public high school publications is clear. The symbiotic relationship which exists in this typical and traditional school activity is sufficient to make critical decisions fairly attributable to the state. Public officials cannot be so intimately involved with the students, yet at the same time be able to abdicate responsibility for decisions which are, after all, the consequence of official school policy.

I. THE FIRST CIRCUIT'S DECISION THAT PUBLIC HIGH SCHOOL NEWSPAPERS AND YEARBOOKS DO NOT IMPLICATE STATE ACTION IS WITHOUT PRECEDENT AND CONFLICTS IN PRINCIPLE WITH THIS COURT'S *HAZELWOOD* DECISION AND THE DECISIONS OF OTHER CIRCUIT COURTS.

This Court, in *Hazelwood School District* v. *Kuhlmeier,* 494 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1989), simply assumed that state action was present in the running of a public high school newspaper, noting "educators' authority over school-sponsored publications . . . that students, parents, and members of the public might reasonably perceive to bear

the imprimatur of the school." *Id.* at 271. "So long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences," "[t]hese activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting." *Id.* This Court expressly differentiated the case in which a student edited publication may reasonably be said to bear a public school's imprimatur from one in which school officials merely allow sales of an off-campus "underground" newspaper on a state university campus. *Id.* at 271 n.3, 108 S.Ct. at 570 n.3 (distinguishing the facts of *Hazelwood* from those present in *Papish* v. *University Mo. Bd. Of Curators,* 410 U.S. 667, 93 S.Ct. 1197, 35 L.Ed.2d 618 (1973)). *See Student Gov't Ass'n* v. *Board of Trustees of Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (distinguishing *Hazelwood,* as a high school newspaper case, from decisions applicable to college newspapers).

In fact, the Ninth Circuit has an *en banc* decision in which state action in the advertising decisions of public high school newspapers is likewise assumed. *Planned Parenthood of Southern Nevada Inc.* v. *Clark County School District,* 941 F.2d 817 (9th Cir. 1991) (*en banc*) (advertising section not a limited public forum). The First Circuit found this precedent "inapposite" because state action was conceded. *Yeo,* 131 F.3d at 251. Given the fact that the students who work on these publications are legal minors, and that public high school officials act *in loco parentis,* some degree of legal control is inevitable, however.

The situation with student-controlled editorial decisions in public institutions of higher education is vastly different, however, and explains why the case law governing state colleges and universities is virtually uniform in concluding

that there is no state action. *Leeds* v. *Meltz*, 85 F.3d 51 (2d Cir. 1996) (no state action in decision by student editors of a newspaper in state supported law school to reject an ad); *Sinn* v. *The Daily Nebraskan*, 829 F.2d 662, 665 (8th Cir. 1987) (no state action in refusal of ad where student paper "maintains its editorial freedom from the state"); *Mississippi Gay Alliance* v. *Goudelock*, 536 F.2d 1073, 1075 (5th Cir. 1976) (no state action where university officials did not supervise editorial judgment); *Avins* v. *Rutgers*, 385 F.2d 151, 153-54 (3d Cir. 1967). *But see Lee* v. *Board of Regents*, 441 F.2d 1257 (7th Cir. 1971) (state action was conceded where the student newspaper was a "state facility").

In this case, of course, there were many other indicia of state action. "The high school's principal controlled the bank accounts of both publications."

> It is one thing for the government to have the power to cut off funding to a group and quite another for the government to own the purse, strings and all. Cf. University of Rhode Island v. A.W. Chesterton Co., 2 F.3d 1200, 1214 (1st Cir. 1993) ("[T]he hand that holds all the purse strings presumably controls the dependent entity.") (emphasis omitted). In the latter case, the entity in question is little more than a subdivision or arm of the government.

Yeo, 1997 WL 292173, *6, & n.7 (panel opinion).

Moreover, both the principal and other school authorities retained authority over what the school publications would publish. They were prepared to exercise such authority in connection with the condom referendum and in cases in-

volving a student wanting to publish obscene or other illegal material. The newspaper was largely funded with public money. Furthermore, both publications' faculty advisors received salary supplements of several thousand dollars a year based on their responsibilities towards the publications.

As Judge Stahl wrote in concurrence,

> Certainly the power of school officials to regulate the content of student publications and the acts of their student editors, see Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266-70, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), is near its apex where the subject of the regulation involves the students' commercial interactions with third parties. And where these interactions arguably implicate the constitutional rights of those third parties, cf. [Polk County v.] Dodson, 454 U.S. [312], 321-22 [1981], and hold out the prospect of monetary benefit to the Town, see e.g., Burton [v. Wilmington Parking Aut.], 365 U.S. [715], 724 [1961] (indicating that conduct which leads to monetary benefits for the State will often be deemed action on behalf of the State), the question is less whether the students may be regulated and more whether the students must be regulated.

Yeo, 131 F.3d at 258 (Stahl, J., concurring).

All the features of government control present in this case make the claim of Respondents that the students were completely independent private actors in deciding whether to ac-

cept or reject advertising totally implausible. The First Circuit's decision that a public high school's official newspaper and yearbook are purely private enterprises is nothing short of unprecedented.

II. THE "COLOR OF STATE LAW" UNDER WHICH THE DECISION TO REFUSE TO PUBLISH WAS TAKEN, TOGETHER WITH THE OTHER INDICIA OF STATE ACTION PRESENT, MAKE THIS ACTION FAIRLY ATTRIBUTABLE TO GOVERNMENT AND AN IMPORTANT MATTER WORTHY OF THIS COURT'S ATTENTION.

This Court has "required a plaintiff seeking to impose liability on a municipality under § 1983 to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." *Board of County Commissioners* v. *Brown,* ___ U.S. ___, 117 S.Ct. 1382, 1388, 137 L.Ed.2d 626 (1997), citing *Monell* v. *New York City Dept. of Social Servs.,* 436 U.S. 658, 694, 98 S.Ct. 2018, 2027 (1978); *Pembaur* v. *Cincinnati,* 475 U.S. 469, 480-81, 106 S.Ct. 1292, 1298-99 (1986); *Canton* v. *Harris,* 489 U.S. 378, 389, 109 S.Ct. 1197, 1205 (1989). Here, there cannot be any doubt that the policy that caused the rejection of the ad was the Town of Lexington's "condom distribution policy." Indeed, the trial judge ruled that "were it not for the controversy surrounding the School Committee's condom distribution policy, [LEXNET's message] would seem one that most responsible adults (and young people) could endorse." (App. 19a). This whole controversy must be seen in that light. But for the adoption of that policy, plaintiff would not have submitted his abstinence advertisement. But for that policy, which as a practical and

political matter was viewed as the opposite of petitioner's abstinence view ("safe sex" versus "no sex"), it is difficult to imagine the rejection of petitioner's ad. The rejection was thus "under color of state law." Even if the condom distribution policy is not necessarily logically opposed to abstinence, it tends in the opposite direction. The presence of such an official policy makes the claim that the students were acting independently quite suspect — and inappropriate for summary judgment.

There is a great likelihood that the policies of the government caused the First Amendment violations alleged in this case and then insulated the government actors from redress. The decisions of this Court indicate that in such circumstances, a State is not shielded from liability because it influenced the discriminatory actions of its citizens. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the [Government] in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961); *Reitman* v. *Mulkey,* 387 U.S. 369, 378, 97 S.Ct. 1627, 18 L.Ed.2d 830 (1967); *Columbia Broadcasting Systems, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 93 S.Ct. 2080, 2120, 36 L.Ed.2d 772 (1973) (Brennan, J., dissenting).

In its *en banc* opinion, the First Circuit declined to find that the State was "the real actor behind the scenes" of the students' decision to censor the plaintiff. *Yeo,* 131 F.3d at 252. Instead, the Court offered the generalization that "public schools not uncommonly have independent student newspapers." *Id.* The *Musket,* of course, was the official Lexington High School student newspaper. The Court also ruled that the "freedom" provided by Mass. Gen. Laws c. 71, § 82, il-

lustrated the policy of the Commonwealth to delegate to students all aspects of decisions like those made by the publications to refuse the petitioner's ad. The Court did recognize that Lexington had previously adopted an official policy of making condoms available to high school students without requiring parental permission. The refusal of the abstinence advertisement was indeed a happy confluence of two policies, the official policy on "safe sex" and the statutory policy regarding student editorial control. "Government actors — the school officials acting under a statute of the Commonwealth of Massachusetts — have chosen to grant editorial autonomy to these high school students."[2] *Yeo,* 131 F.3d at 249. The Massachusetts statute purports to make student editorial decisions private action, as opposed to state action, and thus in effect authorize private viewpoint discrimination.

The Massachusetts statute cannot determine the federal constitutional question of what constitutes state action. *Lebron* v. *National R.R. Passenger Corp.,* 513 U.S. 374, 392, 115 S.Ct. 961, 971, 130 L.Ed.2d 902 (1995) (statutory declaration that Amtrak is not government entity not dispositive of governmental action question where constitutional rights are involved.) Cf. *City of Boerne* v. *Flores,* 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (Congress has been given power to

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[2] M.G.L. c. 71, § 82 provides, in pertinent part, that the "right of students to freedom of expression in the public schools . . . shall not be abridged" and defines the freedom to include students' individual and collective right to "write, publish, and disseminate their views." Further, "no expression made by students in the exercise of such rights shall be deemed to be an expression of school policy and no school officials shall be held responsible in any civil or criminal action for any expression made or published by the students."

"enforce," not power to determine what constitutes constitutional violation).[3]

Indeed, the situation is analogous to *Reitman v. Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967). In that case, California's constitution purported to authorize private discrimination in the sale, lease or rental of real estate. The Supreme Court upheld the California Supreme Court's ruling that the state law "made the State 'at least a partner in the instant act of discrimination.'" *Id.*, 387 U.S. at 375. This Court noted "the necessity for a court to assess the potential impact of official action in determining whether the State has significantly involved itself with invidious discrimination." *Id.* at 380. "[P]rohibited state involvement could be found 'even where the state can be charged with only encouraging,' rather than commanding discrimination." *Id.* at 375.

In the case at bar, this same right to discriminate is likewise a basic policy of the State. Judge Stahl pointed out the danger of allowing viewpoint discrimination by students to stand in his concurring opinion:

> If the student editors of the *Musket* determined to run the paid political advertisements

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[3] Samuel Kafrissen, faculty advisor to the *Musket*, stated in his affidavit that he has always followed legal developments that may have impact on the newspaper. He states that when the *Hazelwood* decision became law, he consulted the then principal, Dr. Waring, who told him that the Lexington High School rejected the approach followed by the Court in *Hazelwood*. Additionally, Kafrissen admitted that he communicated with the Massachusetts Legislator who co-sponsored Mass. G.L. c. 71, § 82 and who concurred that the Massachusetts statute was designed to protect student editorial decisions, such as the decision whether to print Yeo's ad. (Kafrissen Affidavit, ¶¶ 9 and 10.)

> of the Democratic candidates for Town office but not those of Republican candidates, and if the Republican candidates sought injunctive relief against the students in their capacities as editors of the Musket, would we summarily conclude that the challenged action was not undertaken under color of state law? I would like to think not.

Yeo, 131 F.3d at 249 (Stahl, J., concurring).

The First Circuit majority recognized that this case's "state action analysis" is "placed squarely in a very complex and changing area of law." *Yeo,* 131 F.3d at 249. But the line the First Circuit has sought to draw between private and public in the public high-school context turns out to be close,[4] and quite problematic. Two hypotheticals which appear in footnotes to the dissenting opinion of Judge Lynch from the original panel decision illustrate the problem. Judge Lynch's state action analysis was adopted by the majority of the First Circuit, and she wrote the *en banc* opinion. In one variant, she notes that had the issue been racial discrimination rather than viewpoint discrimination, the state-action result would most likely have been different:

> Where such interests are at stake, the acquiescence of a government actor in the discrimi-

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[4] In her dissent from the panel decision, Judge Lynch, who later wrote for the majority in the *en banc* decision, acknowledged, "It is a close question whether the injury cause here 'is aggravated in a unique way by the incidents of government authority,' [citation omitted]. The . . . conclusion that there is state action is both reasoned and reasonable." *Yeo*, 1997 WL 292173, *27 (Lynch, J., dissenting).

> natory actions of a private party may implicate the Constitution. For example, if this were a claim brought by a student who had been excluded from election to the editorial board on account of her race, and the school officials declined to intervene, the analysis would focus on a different decision and most likely would reach a different result.

Yeo, 1997 WL 292173, *36, n.8 (Lynch, J., dissenting). The suggestion that racial discrimination in the publications would be viewed as official and thus governmental action, whereas viewpoint discrimination in the advertising open to the public would not, suggests result-oriented rather than principled decision-making by the court.

So too Judge Lynch notes that a case involving religion would employ a distinct state action analysis:

> The situation is thus different than a hypothetical case, perhaps arising under the Establishment Clause, where an "independent" student organization actually has the covert or overt support of school officials for its decisions.

Yeo, 1997 WL 292173, *36, n.9 (Lynch, J., dissenting). Once again, courts should analyze state action in the same way, whether religion or free speech is implicated.

These hypotheticals illustrate the problem with the "no state action" holding of this case. If the official public high school newspaper and yearbook, bearing the imprimatur of the school, acting under color of state law and official policy,

publicly funded and faculty-guided, do not fairly implicate the government in their refusal to accept an abstinence advertisement, then the public schools have effectively abdicated their educational responsibility for minor students.[5]

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[5] While the state action issue was dispositive in the *en banc* opinion, the panel decision which it vacated had gone on to discuss the limited public forum issue. See *Yeo*, 1997 WL 292173, App. 39a, ff. The Lexington school district did intend to open up the advertising sections of the school newspaper and Yearbook. Because of the very nature of advertising, because the school allowed and encouraged businesses and nonprofit organizations to submit ads, and because sexuality had not been excluded, a limited public forum in the advertising sections had been created. While the state action analysis here coincides with that in *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562 (1988), the public forum analysis does not. There, this Court found that the newspaper published by the journalism class was a nonpublic forum because school officials had not opened it up for "indiscriminate use." Further, students received credits for class, and the newspaper was run by a faculty member during class hours. None of that is true with the advertising at issue here. As a limited public forum, the advertising is analogous to the forum generally open for use by student groups in *Widmar* v. *Vincent*, 454 U.S. 263 (1981).

CONCLUSION

For the foregoing reasons, the Petitioner, through his attorneys, respectfully requests that a writ of certiorari issue.

Respectfully submitted,

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March 6, 1998

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APPENDIX A.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 94-10811-RGS

DOUGLAS E. YEO

v.

THE TOWN OF LEXINGTON, et al.

MEMORANDUM AND ORDER ON
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

APRIL 22, 1996

STEARNS, D.J.

Douglas Yeo's Complaint alleges that the Town of Lexington; David Wilson, the Principal of the Lexington High School; Jeffrey Young, the Superintendent of the Lexington Schools; Samuel Kafrissen, the teacher/advisor of the school newspaper, the Musket; Karen Mechem, the teacher/advisor of the Lexington High School Yearbook; and the Lexington

School Committee,[1] violated his right to free speech guaranteed by the First and Fourteenth Amendments to the United States Constitution and by art. XVI of the Massachusetts Declaration of Rights. The dispute arose when the Musket and the 1993-1994 Yearbook rejected an ad counseling teenage sexual continence. This was the text of the ad:

We know you can do it!
ABSTINENCE: The Healthy Choice
For accurate information on abstinence, safer sex and condoms,
contact
Lexington Parents Information Network (LEXNET).
Post Office Box 513, Lexington, Massachusetts 02173).[2]

The defendants seek summary judgment, arguing that Yeo has failed to show any element of state action in the rejection of his ad, or, if he has, that neither student publication is a public forum.[3]

FACTS

The material facts, viewed in the light most favorable to Yeo, are these. The Musket is the Lexington High School

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[1] The five members of the School Committee, John Oberteuffer, Lois Coit, Joseph Dini, Susan Elberger, and Barrie Peltz, have been individually named as defendants.

[2] After filing this lawsuit, Yeo's ad was rejected by the new editors of the same student publications. Yeo seeks redress for these rejections as well.

[3] Defendants also argue that even if Yeo could show state action, both publications have since been lawfully closed as public fora and that the individual defendants are entitled to qualified immunity.

(LHS) student newspaper. It publishes on school property. The Lexington school system pays for the Musket's printing expenses and supplies. It also pays a yearly stipend of $1,373 to a faculty member to serve as a staff advisor. Samuel Kafrissen, a social studies teacher at LHS, has been the faculty advisor to the Musket since 1978. David Wilson, the LHS Principal, has custody of and signing authority over the Musket's checking account.[4]

The Musket publishes five to seven issues a year. The Musket is managed by a student editor-in-chief who is selected by the previous year's editor-in-chief. The editorial staff is chosen by the incoming editor. The editorial board of the Musket, which consists entirely of students, has the authority to make all editorial and business decisions regarding news articles, editorials and advertisements. The student editors are not required to submit their copy for prior approval by the school administration.[5]

During the 1993-1994 academic year the Musket had an unwritten policy of refusing advertisements from political candidates (including student candidates), political organizations, advocacy groups and cigarette manufacturers. During the 1994-1995 academic year, the Musket adopted this policy in writing. The Musket has never accepted a political or advocacy advertisement. It has accepted advertisements for banking services, pizza, driving school classes, tuxedo rentals, and class rings. Not every issue of the Musket, however, includes advertisements.

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[4] Wilson oversees the checking accounts of all LHS student organization.

[5] The school administration has a policy prohibiting the printing of obscenity or any other material that violates state or federal law.

The Yearbook is published annually and is managed by an editor-in-chief or by co-editors-in-chief selected by the graduating editor(s). The Lexington school system allows the Yearbook staff to use school facilities and pays a faculty advisor a $1,996 yearly stipend. The Yearbook is otherwise financially self-sufficient. Karen Mechem, a LHS reading teacher, has been the Yearbook's faculty advisor since 1980. The staff of the Yearbook is authorized to make all decisions concerning its contents.

Since the late 1980s, the Yearbook has accepted congratulatory messages submitted by students and parents and advertisements placed by local businesses and businesses catering to student needs. The Yearbook has never printed a political advertisement or an advocacy group message.[6] The student editors of the 1994-1995 Yearbook adopted a formal policy limiting paid messages to students and parents of graduating seniors.

The seeds of this lawsuit germinated in a community debate over the Lexington School Committee's decision to distribute condoms and information regarding sexually transmitted diseases to students without parental consent. Yeo opposed the policy and organized a political action group that successfully

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[6] Some student message excerpts in the Yearbook plaintiff labels "sexually suggestive." Yeo affidavit, ¶ 7. Yeo offers two as illustrations. The first states: "S the Stud . . . THE KISS . . . 'I think you need a massage' . . . Keep your legs CROSSED! . . . have you ever had an affair . . . I want to feel your love . . . wonderful tonight." (1992 LHS Yearbook, page 217). The second reads: "Mount up! It means get on your horses. Well, we're just going to have to use our brains. Damnit!" (1992 LHS Yearbook, page 224). Yeo cites these messages presumably as rebuttal to the Yearbook editors' contention that they intended the Yearbook to be a non-controversial souvenir of the high school experience.

placed the issue on the 1993 Town ballot. A majority of the Lexington voters, however, supported the School Committee's condom policy.

During the referendum campaign, the Musket printed several articles expostulating on the merits of the controversy. Yeo felt that some of the editorials and news stories contained "abusive and inaccurate rhetoric directed towards [him]" and "gross distortions of the facts." Yeo affidavit, ¶ 18 and 19. In December of 1992, Yeo wrote Wilson to complain about the Musket's perceived bias. Yeo followed up in January by meeting with Wilson to object to the fact the Musket was editorializing about the referendum while receiving public funds.[7]

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[7] Although it is somewhat unclear from the record, it appears that Wilson, on the advice of the Lexington Town Counsel, advised the students to refrain from publishing opinion pieces favoring or disfavoring the condom distribution policy during the referendum campaign. Norman Cohen, the Town Counsel, apparently believed that editorial comment was prohibited by the Office of Campaign and Political Finance because the Musket received public funds. Cohen's opinion was apparently inspired by Anderson v. City of Boston, 376 Mass. 178 (1978). Yeo argues that Cohen's intercession demonstrates that the students did not independently run the newspaper and that Wilson and the school administration dictated its contents.

The record, however, divulges the fact that the students did not heed Wilson's advice. After seeking independent legal counsel, on March 14, 1993, the editors publicly defended their right to publish without official interference. As they stated:

> [w]e disagree that [any restrictions] were necessary, appropriate, or legally applicable. We contend that in light of the language of the Massachusetts free speech statute governing school newspapers [G.L. c. 71, § 82] and in light of the fact that general law 71:82 was passed ten years after the Anderson decision, the administration and the town's attorney grossly misinterpreted the extent to which the Anderson ruling governed school publications.

In July of 1993, Yeo wrote to the School Superintendent, Jeffrey Young, complaining about the Musket's quality and accuracy. Young responded by letter on August 13, 1993, stating:

> I sometimes find myself agreeing and then other times disagreeing with the editorial stance expressed in the Musket. The student newspaper, as you know, has a right to express its own views, and we choose not to exercise censorship, although the opinions expressed on the editorial page of the student newspaper should exhibit good sense and respect for individual differences.

The road to this litigation embarked when Lexington voters endorsed the School Committee's condom distribution policy. On May 31, 1993, Yeo joined in establishing an organization called the Lexington Parents Information Network (LEXNET) to educate parents about public school issues. On November 1, 1993, Yeo, on behalf of LEXNET, sent the abstinence adver-

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> We believe that public law 71:82 was purposely adopted to prevent the kind of infringement of free speech described above. We have recently had our position verified by the General Counsel for the Legal Division of the Massachusetts Department of Education. . . . The Musket wants to make it clear to the administration that this sort of censorship is unacceptable and will not be tolerated. We will not allow our rights to be restricted. We are offended and outraged at the actions of the administration, and we recommend strongly that the officials of Lexington High School reconsider their policy of interfering with contents of the student-run Musket.

tisement to the Yearbook together with a $200 check. On November 3, 1993, Mechem returned a copy of Yeo's letter with a notation thanking him and acknowledging receipt of the check. Yeo's advertisement was pooled with others, and later forwarded to a printer to be proofed. When the proofs were returned, the editors began the task of determining the Yearbook's layout and the appropriateness of each ad.

On January 3, 1994, and again on January 20, 1994, Yeo wrote to the business editor of the Musket, Dong Shen, requesting information regarding advertising rates. Shen sent Yeo an advertising request form with a cover letter stating "[o]f course ads are still subject to approval of the editorial board." On February 1, 1994, Yeo submitted the abstinence message to the Musket.

A day or two later, the co-editors of the Yearbook, Natalie Berger and Dow-Chung Chi, asked Mechem to call Yeo to tell him that the Yearbook staff had decided against printing the LEXNET ad. They also instructed Mechem to invite Yeo to rewrite the ad in a tone more appropriate to the mission of the Yearbook. In an affidavit, Ms. Berger states that the editors of the Yearbook made this decision without consulting Mechem or any other school administrator. Ms. Berger states that the editors rejected the ad because they believed it "constituted a political/advocacy statement that was out of context with the other sections and simply had no place within the confines of the yearbook, which is intended to be a collection of fond memories of each graduating classes' high school years."[8]

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[8] Yeo contends that this fact is disputed because he believes that the editors of the Yearbook abdicated their decision to either Mechem or to other school officials. Yeo, however, has not pointed to anything of a material nature disputing Ms. Berger's affidavit. He relies instead upon two extraneous facts. First, that the Editor in Chief of the 1992 Yearbook, Heidi Ludwig, stated in her Yearbook dedication that "[t]he second person

During the telephone conversation with Mechem, Yeo rejected the students' offer. After speaking with Kafrissen, Mechem wrote to Yeo on February 4, 1994, reaffirming the students' decision, stating that "[b]ecause of the non-controversial nature of the advertising section of the yearbook, we have decided not to print [the] advertising you have submitted." On February 13, 1994, Yeo wrote to Mechem demanding that the decision be reconsidered.

On February 24, 1994, Dong Shen wrote Yeo on behalf of the Musket to inform him that the Musket had rejected the ad:

> [a]fter careful consideration of your advertisement . . . the Musket came to the difficult decision of not printing it. In no way did we want to limit your right to express your opinion, but we could not accept a political statement as an advertisement. Our own advertisement policy dictates so for good reasons. If we were to accept a politically aligned advertisement, we at the Musket would feel obligated to accept other political statements that might come our way.

I am deeply grateful to is Mrs. Mechem. When I was completely overwhelmed with Yearbook *stress,* she calmed me down and told me that, believe it or not, there are things more i[m]portant than yearbook. She took over and did countless tasks for me while I couldn't." How this expression of gratitude to Mechem by a prior Yearbook editor contradicts Ms. Berger's affidavit Yeo does not say. Second, Yeo finds it significant that Mechem referred to herself in the plural when relaying the student editors' rejection of the ad. The use of collective nouns by Mechem is consistent with her deposition testimony that while she was acting as the students' agent in conveying their message, she also wanted to protect them from harassment by Yeo. In any event, the conversation is too ambiguous to bear the freight Yeo attempts to lade.

> We do not wish to put ourselves in such position. Ultimately Ad space is not a public forum and for that reason the Musket reserves the right to select what Advertisements it chooses to print.

Yeo then protested to school officials. Believing that Yeo was preparing to bring a lawsuit, Wilson contacted Kafrissen and told him that Town Counsel thought it best that the students print the LEXNET ad.

In response, Ivan Chan, the Editor of the Musket, sought the advice of the Student Press Law Center of Washington, D.C., and the Civil Liberties Union of Massachusetts. Kafrissen contacted several lawyers, a member of the school committee, and the state legislator who had drafted G.L. c. 71, § 82. The editors decided again to reject the ad.[9] The editors asked Kafrissen to write Yeo to ask him whether he wished to submit his views for publication in the "Letters to the Editor" column of the Musket, the section of the newspaper designated by the students as a public forum. Kafrissen complied by writing to Yeo on March 1, 1994. In the body of the letter he used the word "we" and our" when referring to the Musket and the decision to reject the ad.[10]

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[9] The reason the students gave, however, differed from their initial rejection. Originally, the editors of the newspaper were under the impression that LEXNET was a political group. They now understood it to be a civic organization. The advertisement was thus rejected solely for its controversial content.

[10] Yeo asserts that it is significant that Kafrissen wrote this letter without Wilson or Young's permission, although why this is so is not apparent, at least insofar as Yeo's view of the case is concerned.

On March 1, 1994, Yeo again met with Wilson. Wilson told Yeo that Superintendent Young wanted both advertisements printed because the Town Counsel had determined that they should be published. Wilson assured Yeo that he would see that the advertisements were printed and accepted from Yeo the uncashed $200 check that the Yearbook had returned.[11] On March 7, 1994, Yeo responded to Kafrissen's letter declaring that the Musket's refusal to print the LEXNET ad was a violation of his right to free speech. Sometime thereafter, a student group submitted an advertisement to the Musket in a format identical to the LEXNET ad. It advocated safe sex as the "healthy choice." The Musket rejected the ad.

On March 11, 1994, at Kafrissen's request, Young convened a meeting to discuss the controversy. Kafrissen, Mechem, Chan, Berger, Chi, and Wilson attended. Young questioned the participants about the history of the dispute. Young called another meeting on March 18, 1994, consisting of Kafrissen, Mechem, Chan, Berger, Chi, two members of the school board, and the LHS Vice Principal (who was sifting in for Wilson). At the meeting, the student editors stated that they did not plan to print Yeo's advertisement. Young urged the editors to consider the implications of their decision and to give it more thought. Shortly after the meeting, Ivan Chan reaffirmed the editors' decision.

On March 23, 1994, Wilson assured Yeo that he would "make sure" that the Yearbook did not delay its decision until it was too late "or else I won't be principal." Plaintiffs Memorandum in Opposition, p. 18. Thereafter, the editors of the

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[11] Yeo contends that two weeks later he learned that Wilson had changed his mind about publishing the ads. Wilson denies ever making any statement promising that the ads would be printed.

Yearbook asked Mechem to invite Yeo to a meeting to explore a compromise. Yeo referred Mechem to LEXNET's lawyer. The Yearbook editors discussed the issue with Mechem and, after she left the room, reaffirmed their decision to reject the ad. On April 8, 1994, Mechem communicated the decision of the Yearbook editors to Yeo. Yeo filed this lawsuit on April 26, 1994.

DISCUSSION

Summary judgment is appropriate when, based upon the pleadings, affidavits, and depositions, "there is no genuine issue as to any material fact, and [where] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Gaskell v. Harvard Co-op Society, 3 F.3d 495, 497 (1st. Cir. 1993). An issue is only genuine if there is sufficient evidence to permit a reasonable jury to resolve the point in the non-moving party's favor. NASCO, Inc. v. Public Storage, Inc., 29 F.3d 28, 32 (1st Cir. 1994). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 249-250 (1986) (citations omitted).

The defendants maintain that Yeo's claims cannot withstand summary judgment because any alleged violation of his right to free speech cannot be ascribed to state action. "'[T]he constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state.'" Kay v. New Hampshire Democratic Party, 821 F.2d 31, 33 (1st Cir. 1987), quoting Hudgens v. N.L.R.B., 424 U.S. 507, 513

(1976).[12] The defendants argue that the undisputed material facts demonstrate that the Yearbook and the Musket are independently run student publications and that the acts of their editors are those of private parties immune from constitutional challenge.[13]

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[12] Art. XVI of the Massachusetts Declaration of Rights is no more expansive in this regard than the First Amendment. See Commonwealth v. Hood, 389 Mass. 581, 585 (1983).

[13] Defendants assert that LHS publications operate outside of the control of the school administration because anything less would violate Massachusetts law. G.L c. 71, § 82, mandates that:

> [t]he right of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder within the school. Freedom of expression shall include without limitation, the rights and responsibilities of students, collectively and individually, (a) to express their views through speech and symbols, (b) to write, publish and disseminate their views, (c) to assemble peaceably on school property . . . .
>
> No expression made by students in the exercise of such rights shall be deemed to be an expression of school policy and no school officials shall be held responsible in any civil or criminal action for any expression made or published by the students.
>
> For the purposes of this section and sections eighty-three to eighty-five, inclusive, the word student shall mean any person attending a public secondary school in the commonwealth. The word school official shall mean any member or employee of the local school committee.

Yeo asserts that the facts, indulged in his favor, demonstrate the contrary.[14] Yeo advances two separate theories as to

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[14] On May 17, 1995, Yeo filed a motion under Fed. R. Civ. P. 56(f) requesting additional discovery prior to a determination of defendants' summary judgment motion. The request was denied. Yeo contends that the court's discovery orders have hampered presentation of his side of the case and that he requires at least three additional depositions to flesh out his opposition to the motion. The court previously denied two of Yeo's deposition requests (Young and School Committee member Lois Coit) because of Yeo's failure to comply with the court's discovery orders. The third deposition request (of Cohen, the Lexington Town Counsel), comes without an adequate explanation as to why it was not asked for earlier in the proceedings.

The court held a scheduling conference pursuant to Local Rule 16.1 on October 3, 1994. During the conference the court asked the parties to stipulate the number of depositions to be taken. Counsel for the plaintiff stated that he wanted to take only the deposition of Wilson. The defendants chose to take only Yeo's deposition. The court granted the deposition requests, ordered that discovery be completed by January 1, 1995, and directed that any additional depositions be taken only with leave of court.

On December 15, 1994, Yeo asked permission to take five additional depositions. He did not state the reason why these depositions were not requested at the October scheduling conference. On December 28, 1994, the court denied plaintiffs motion without "a more substantial showing as to the need for the additional depositions."

On January 11, 1995, Yeo filed a motion to reconsider. Yeo again failed to explain why the additional depositions had not been identified earlier. Instead, the plaintiff stated "that to give this Court more reasons beyond the Complaint, numbering 25 pages, automatically telegraphs to the other side, issues which should not be announced before a deposition." (No offer was made to supplement the response with an ex parte submission). Notwithstanding this less than fulsome response, on January 31, 1995, the court gave Yeo permission to take the depositions of Samuel Kafrissen and Karen Mechem. The depositions were to be completed by March 10, 1995. On February 10, 1995, plaintiff requested an extension of time to complete the depositions. On February 22, 1995, the court ex-

why the decisions of the Musket and the Yearbook were emblematic of state action.[15] He first contends that the student publications' dependence on the school system was so symbiotic as to make the conduct of the students chargeable to the state. He separately argues that Young, Wilson, Mechem and Kafrissen, either in concert or acting independently, directed the students to reject the LEXNET ad and then cloaked their actions in the mantle of student editorial prerogative. In a variant of this second argument, Yeo singles out Kafrissen as a Svengali-like presence on the LHS campus who manipulated students and administrators according to his personal political agenda. Each theory will be addressed in turn.

Yeo finds that three of the four indicia of state action identified in Sinn v. Daily Nebraskan, 829 F.2d 662, 665 (8th Cir. 1987), permeate the relationship between the school authorities and the editors of the Musket and the Yearbook. The Sinn factors "(1) extensive regulation, (2) receipt of public funds, (3) type of function involved, and are (4) presence of a symbiotic relationship."[16] See Rendell-Baker v. Kohn, 457 U.S. 830, 840-842 (1982); Blum v. Yaretsky, 457 U.S. 991, 1004-1005 (1982); Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937 (1982). Yeo argues that because both publications received financial support from the school and were dependent

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tended the deposition deadline until March 31, 1995, and ordered that dispositive motions be filed by May 1, 1995. On May 17, 1995, after receiving defendants' summary judgment motion, plaintiff filed his Rule 56(f) request.

[15] Yeo's competing theories of state action are somewhat indiscriminately laid out in his pleadings. For the sake of clarity, I have tried to place each theory in a distinct factual context.

[16] Yeo does not contend that either publication fulfilled a function "typically performed" by the state, the third of the Sinn factors.

on Wilson's check writing authority, the second factor of the Sinn test has been met. While it is undisputed that the Musket and, to a lesser degree, the Yearbook received school funds, that alone is insufficient to establish state action. "Even near-complete governmental funding does not turn a private charitable and educational institution into a public entity so long as the private institution remains free, in fact, to control its own affairs." Rendell-Baker v. Kohn, 641 F.2d 14, 25 (1st Cir. 1981), aff'd, 457 U.S. 830 (1982). See also Blum v. Yaretsky, 457 U.S. at 1011. Yeo must also show that the students' decision not to publish the LEXNET ad was compelled or influenced by state regulation. See Phillips v. Youth Department Program, Inc., 390 Mass. 652, 655-656 (1983). Yeo argues that "the Musket is a high school newspaper with all of the usual limitations and regulations of curricular activities," Plaintiffs Memorandum in Opposition, p. 24, without any further factual elaboration. As far as the record reveals, the only formal regulation governing the students' conduct was a school policy prohibiting the publication of obscene and illegal matter. Moreover, as far as one can determine from the record, the only significant interaction between school administrators and the student editors came about because of Yeo's prodding (with minimal results). In the spring of 1993, the editors of the Musket adamantly rejected the attempts of Wilson and the Lexington Town Counsel to restrain their coverage of the condom referendum. Wilson's subsequent promise to Yeo that he would force the editors to retract their rejection of the ad proved equally ineffectual.

For state action to exist government must do more than regulate in some abstract sense (indeed, that is what governments exist to do): government must actually participate in or dictate the challenged decision. "[R]egulation and subsidiza-

tion of an entity, without more, do not create state action. . . . [T]he proper test . . . rather, [is] whether the challenged action [is] 'fairly attributable' to the state." Sinn, 829 F.2d at 665, quotinq Rendell-Baker v. Kohn, 457 U.S. 830, 838-841 (1982). See also Arlosoroff v. National Collegiate Athletic Association, 746 F.2d 1019, 1022 (4th Cir. 1984). Yeo argues that because the Musket and the Yearbook are for all practical purposes alter egos of the school (the symbiotic relationship or mutual benefit test), such attribution can be inferred. Yeo points to the fact that the school's name is on the masthead of the newspaper, positive publicity from both publications benefits the school, the publications themselves "revolve around the High School and its population," and they "serve[] as a channel of communication for the faculty and administration" to the Lexington community. Yeo contends that these factors plus the fact that the principal and the faculty advisors "were informed of and involved in" the editorial process is enough to establish an inference of state action.

Yeo maintains that the intensity of the relationship distinguishes the LHS publications from cases involving student publications found by courts not to be state actors in somewhat factually similar circumstances. I do not see any material differences in the cited cases. In Sinn, the court found that where a college newspaper was editorially independent from its host (public) university, the actions of the newspaper were not "fairly attributable" to the State even though the newspaper relied on the university for financing and its policy committee was appointed by the university's Board of Regents. In Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1075 (5th Cir. 1976), where the students elected the editor of the student newspaper and university officials did not supervise or control its contents, the court did not find state action despite the fact

that the paper was in part funded by the university and acted as a forum for university-student communications.[17]

While the evidence indicates that LHS school administrators kept abreast of the dispute and attempted to mollify Yeo by encouraging the students to soften their stance, nothing in the record indicates that the administration actually succeeded in influencing the student editors' decision (except perhaps in a negative way) to reject the LEXNET ad. "A symbiotic relationship, where present, denotes a level of functional intertwining whereby the state plays some meaningful role in the mechanism leading to the disputed act." Frazier v. Board of Trustees of Northwest Mississippi Regional Medical Center, 765 F.2d 1278, 1288 (5th Cir. 1985). That element, of meaningful participation in the disputed act, is lacking here. See Gardner v. Governor Apartments Associates, 396 Mass. 661, 665 (1986).

Yeo alternatively argues that there is direct state action in this case because it was the school administrators who actually made the decision not to print the ad. Yeo maintains that because "Wilson, Kafrissen, and Mechem held themselves . . . out as [being] capable of resolving" the conflict, Plaintiffs Memorandum in Opposition, pp. 31-32, a finder of fact could

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[17] Yeo argues that Sinn and by implication, Mississippi Gay Alliance, are distinguishable because of the difference in the degree of autonomy society confers on college as opposed to high school students. Yeo asserts that the idea that LHS students were accorded the measure of independence that defendants claim "is unlikely in the extreme. And, if that fact were so, there would be a powerful argument that the school had abdicated its responsibilities towards the students and the taxpayers in respect to the proper education and supervision of the student body on school grounds." Plaintiffs Memorandum in Opposition, p. 31. That such independence would have existed seems unremarkable in light of G.L. c. 78, § 82. It is not clear whether Yeo is angrier at the students for defying his wishes, or the school administrators for refusing (or failing) to knuckle them under.

infer that it was the school officials who were the real actors in the piece. The record does not support Yeo's contention. Yeo has presented nothing other than personal conjecture to dispute the student editors' sworn affidavits that they made the decision to reject Yeo's advertisement on their own without any dictation by, and indeed in defiance of, the school administration.

Finally, Yeo contends that Kafrissen on his own made the decision to reject the Musket ad and that he instructed Mechem to order the Yearbook editors to follow suit.[18] Yeo argues that Kafrissen was biased against him and LEXNET because Kafrissen had been involved in the founding of the Parent/Student Congress (the group that recommended the condom distribution policy to the school board).[19] Yeo maintains that Kafrissen is a state actor because he wrote to Yeo rejecting the Musket advertisement without the consent of his superiors while on his own time and using his home computer; he misled the students into believing that LEXNET was a political caucus when it was actually a civic organization; he discussed the ads with Mechem; he attended the meetings called

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[18] Yeo asserts that Kafrissen "emerges as the key state actor in these proceedings, dominating all other . . . defendants. . . . The dominance of Kafrissen, his penchant to negate a counterbalancing of the condom distribution without parental consent controversy, dictated that Mechem test the water first with her rejection of the Yeo Ad. . . . Kafrissen . . . now aware of the seriousness of Yeo's intent to have the LEXNET Ad printed, orchestrates the Busines. Manager to reject the Yeo Ad in the Musket." Plaintiffs Memorandum in Opposition, pp. 19-20.

[19] Kafrissen's involvement with the Parent/Student Congress appears to date from 1987. Yeo's assertion, however, that Kafrissen used the Congress to "initiate condom distribution in LHS, without parental consent," Plaintiffs Memorandum in Opposition, p. 19, is not supported by any citation to the record.

by Young; and he contacted attorneys and a state legislator on the students' behalf.

The fact that Kafrissen is a state actor (although not for the reasons Yeo cites), is insufficient to establish state action.[20] "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives . . . ." Blum v. Yaretsky, 457 U.S. at 1004-1005 (1982). "To allow a finding of state action to stand when it has been shown only that the government acquiesced in the conduct of private parties would push the concept of state action far beyond present bounds." Ponce v. Basketball Fed'n of the Commonwealth of Puerto Rico, 760 F.2d 375, 380 (1st Cir. 1985). If this were not so, every government agent having any contact with a private organization involved in a dispute concerning the First Amendment would implicate the government as a potential defendant.

At the end of the day, one wonders whether this litigation was necessary. The fault does not lie with the LEXNET's message, which were it not for the controversy surrounding the School Committee's condom distribution policy, would seem one that most responsible adults (and young people) could endorse. The explanation for the controversy may lie in the tendency of adults to assume the worst about the behavior of teenagers. Here a group of adults concerned with teenage

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[20] The facts Yeo cites portray Kafrissen as a rogue employee acting without the approval of his superiors and in personal defiance of the State's policy of noninterference by school officials with school newspapers. Where a government employee acts for private reasons uninfluenced by any intent to benefit a governmental function, his acts cannot be charged to the State. See United States v. Attson, 900 F.2d 1427, 1433 (9th Cir. 1990) (Fourth Amendment); State v. Smith, 763 P.2d 632, 637-639 (Kan. 1988) (same); State v. Walker, 459 N.W.2d 527, 531-532 (Neb. 1990) (same).

sexual behavior, having lost the main battle, sought to use the public schools as a forum in which to proselytize their views. While adults have the right and the responsibility to provide moral instruction to the young, the students here chose to resist adult intrusion, however well-intentioned, on their prerogatives. In an ironic way, they exhibited the very traits of personal responsibility and self-reliance that Yeo and his supporters, in another context, were urging that they emulate. Whether they should have decided the ad issue differently is not the point. The decision was theirs to make. Such is the power conferred by the First Amendment, even on the young.

ORDER

For the foregoing reasons, the defendants' motion for summary judgment is
ALLOWED.[21]

SO ORDERED.

/s/
UNITED STATES DISTRICT JUDGE

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[21] The defendants argue that even if state action could be established, they are still entitled to summary judgment because neither student publication is a public forum. In as much as I have granted summary judgment because of Yeo's failure to show state action, this argument need not be addressed. But see Perry Educational Ass'n. v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983).

APPENDIX B. (Opinion withdrawn)

Douglas E. YEO, Individually and on Behalf of
His Children and as Chairman of
the Lexington Parents Information Network,
Plaintiffs, Appellants,

v.

Town of LEXINGTON, Jeffrey Young,
Superintendent, David Wilson, Principal,
Samuel Kafrissen, Karen Mechem and Joseph
Dini, Chairman, John Oberteuffer,
Lois Coit, Susan Elberger and Barrie Peltz,
Individually and as They Are
Members of the Lexington School Committee,
Defendants, Appellees.

No. 96-1623.

United States Court of Appeals,
First Circuit.

Heard Nov. 7, 1997.

Decided June 6, 1997.

John W. Spillane, Worcester, MA, with whom Gregory D. Smith was on brief, for appellants.

Adam P. Forman, Boston, MA, with whom Jason Berger, Marla Dubin, and Testa, Hurwitz & Thibeault, LLP were on brief for appellees.

Before STAHL, Circuit Judge, BOWNES, Senior Circuit Judge, and LYNCH, Circuit Judge.

STAHL, Circuit Judge.

*1 This case involving alleged violations of free speech and equal protection rights stems from the refusal of a public high school's newspaper and yearbook to print advertisements promoting sexual abstinence submitted to them by plaintiff-appellant, Douglas E. Yeo. Yeo appeals from a district court summary judgment in favor of defendants-appellees, the Town of Lexington, Massachusetts and nine individuals who either serve on the town's school committee or are employed in its public school system in an administrative or teaching capacity (hereinafter "town and town officials" or "town defendants").[1] Because the district court erroneously concluded that no state action was involved in the rejection of the plaintiff's advertisements, and finding that the advertisement sections of the public high school newspaper and yearbook in question constituted limited public fora during the relevant academic year, we reverse the grant of summary judgment and remand the case for further proceedings consistent with the opinion that follows.

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[1] The individually-named defendants-appellees are as follows: Jeffrey Young, Superintendent of Schools; David Wilson, Principal of Lexington High School; Samuel Kafrissen and Karen Mechem, teachers at Lexington High School; Joseph Dini, John Oberteuffer, Lois Coit, Susan Elberger, and Barrie Peltz, members of the Lexington School Committee.

Standard of Review

[1] We exercise plenary, de novo review of a district court's entry of summary judgment. See Ortiz-Pinero v. Rivera-Arroyo, 84 P.3d 7, 11 (1st Cir.1996). Summary judgment is only appropriate where there are no genuine disputes as to material facts and the moving party is entitled to judgment as a matter of law. See Fed .R.Civ.P. 56(c). We review the record evidence in the light most favorable to the non-moving party, and thus draw all reasonable inferences and resolve factual disputes in favor of the party against whom summary judgment has been entered, in this case, the plaintiff-appellant. See Den Norske Bank v. First Nat'l Bank of Boston, 75 F.3d 49, 53 (1st Cir.1996).

Background and Prior Proceedings

The seed from which this case germinated was the Lexington School Committee's 1992 decision to distribute condoms and informational packets about their proper use as part of "safe sex" education to high school students without parental consent. The school committee's decision was both preceded and followed by extensive controversy and much public debate within the school and the wider community.

Proponents of a condom distribution policy circulated support petitions at Lexington High School ("LHS") and succeeded in securing the signatures of some 500 students, faculty members, and administrators, a figure representing about one-third of the LHS community. The LHS Student/Faculty Senate voted in favor of the condom policy. When the school's prin-

cipal, David A. Wilson, vetoed the measure, the Senate responded in kind by voting to override his veto.

The high school newspaper, the Musket, took an immediate and keen interest in following the story as it developed. In its January 31, 1992 edition, it took a strong editorial position in favor of making condoms freely available at LHS. Among the teachers who were most prominent in supporting the proposed condom policy and advocating its adoption before the Lexington School Committee was Samuel Kafrissen, a faculty member of the LHS Senate and the Musket's faculty advisor.

***2** Yeo, a bass trombonist with the Boston Symphony Orchestra who had been featured in the Musket and had played with LHS music groups, was among the Lexington parents who opposed the School Committee's decision to make condoms and "safe sex" materials available free of charge and without parental consent. Together with other active and like-minded Lexington parents, Yeo helped to gather the requisite number of signatures to place the school's condom distribution policy on the 1993 town ballot. Yeo's efforts through the ballot initiative failed when a majority of Lexington's voters endorsed the high school condom policy.

In the aftermath of the town referendum, Yeo helped to organize a group called the Lexington Parents Information Network ("LEXNET"), whose stated purpose was to help inform Lexington parents about public school issues. In November 1993, Yeo, acting on behalf of LEXNET, sent an advertisement to the LHS Yearbook, along with a check for $200. The ad's text stated:

We know you can do it!
ABSTINENCE:
The Healthy Choice
Sponsored by:
Lexington Parents Information Network (LEXNET)
Post Office Box 513, Lexington, Massachusetts
02173

Two days later, Karen Mechem, the Yearbook's faculty advisor, returned a photocopy of Yeo's letter on which she had written a message thanking him for the ad and acknowledging the check's receipt. Yeo's advertisement was then sent along with others to a printer so that proofs could be made.

In January 1994, Yeo wrote a letter to the Musket asking for information about the paper's advertising rates. About three weeks later, having had no reply, he wrote again. This time he received a copy of the paper's advertisement form, along with a cover letter, which, in relevant part, stated that "ads are still subject to approval of the editorial board." About a week later, on February 1, 1994, Yeo submitted an ad similar to the one he had previously submitted to the Yearbook, but with an additional line stating that interested readers should contact LEXNET:

We know you can do it!
ABSTINENCE:
The Healthy Choice
For accurate information on abstinence,
safer sex and condoms,
contact:
Lexington Parents Information Network (LEXNET)

Post Office Box 513, Lexington, Massachusetts
02173

Several days after Yeo submitted this second ad, the Yearbook's co-editors asked their faculty advisor, Mechem, to call Yeo and inform him that the Yearbook was not going to print his ad as submitted, but would be willing to offer him the chance to rewrite it as a message of congratulations to the graduating senior class, without any mention of sexual abstinence. In the subsequent phone conversation between Mechem and Yeo, Yeo rejected the suggestion that he rewrite the ad. Mechem then conferred with Kafrissen, the Musket faculty advisor, and on February 4, 1994, she wrote a letter to Yeo in which she stated that "[b]ecause of the non-controversial nature of the advertising section of the yearbook, we have decided not to print [the] advertising you have submitted." On February 13, Yeo wrote back asking the Yearbook to reconsider its rejection.

*3 On February 24, Yeo did in fact receive a response, but from Dong Shen, business manager of the Musket, who wrote to inform him that the newspaper, too, would not print his ad. Yeo then protested the refusals to Principal Wilson and other school officials. The town's legal counsel advised Wilson that the newspaper and yearbook should print the ads so as to avoid possible litigation. Wilson contacted Kafrissen to notify him of the town counsel's legal opinion.

The Musket, in turn, sought its own legal advice, and relying on the opinion received, decided to stand by its refusal to print the LEXNET ad. On March 1, 1994, Kafrissen wrote a letter to Yeo on behalf of the Musket in which he set forth a com-

promise solution; specifically, the newspaper would print a letter to the editor from Yeo in which he could state his opinion on the condom policy. That same day, Yeo met with Principal Wilson, who told Yeo that Superintendent Young was anxious to see the school newspaper and yearbook print the LEXNET ads because that was what the town's legal counsel had recommended. Yeo insists that Wilson assured him that the ads would be published, something Wilson denies, but Wilson, in any event, accepted the still uncashed check that Yeo had originally submitted with the Yearbook ad, which the Yearbook had returned.

On March 7, Yeo responded to Kafrissen's letter. In his reply, he refused the Musket's proposed compromise and explained his view that the newspaper's refusal to print the ad amounted to a violation of his free speech rights. Four days later, Superintendent Young convened a meeting of the respective chief editors and faculty advisors of both the Musket and the Yearbook, with Principal Wilson also attending, to discuss the dispute. On March 18, Young chaired a second, similar meeting that included two Lexington school committee members. Superintendent Young urged the student editors to take the time to reflect and to consider carefully the implications of their continued refusal to print the ads, particularly in light of Yeo's credible threat of pursuing the matter in court. The assembled school officials nonetheless made it clear to the students that they "support[ed] the students' right to decide." The students, for their part, were not to be moved. By April 8, 1994, the Musket and LHS Yearbook had both reaffirmed their refusal to print the LEXNET abstinence ads. Before the month was out, Yeo filed this suit in federal district court.

Yeo's federal action claimed that the refusals of the school newspaper and yearbook to print the ads he submitted on behalf of LEXNET violated his rights to free speech and equal protection as guaranteed by the First and Fourteenth Amendments to the U.S. Constitution, Article 16 of the Massachusetts Declaration of Rights, and 42 U.S.C. § 1983.[2] Yeo sought a temporary restraining order prohibiting publication of either the newspaper or the yearbook in the event they did not include the LEXNET ad. The district court denied the motion and refused Yeo's subsequent attempt to preliminarily enjoin publication of the school newspaper. We affirmed the district court's refusal to grant the preliminary injunction, dismissed Yeo's appeal for want of appellate jurisdiction on the ground of mootness, and remanded the case to the district court.[3]

*4 On remand, the, town defendants collectively moved for summary judgment pursuant to Fed.R.Civ.P. 56(c) on the grounds that Yeo could not establish either the existence of state action or that the school newspaper and yearbook had been or continued to be public fora.[4] Without reaching the other reasons proffered, the district court (Stearns, J.) granted the defendants' motion for summary judgment on the ground that Yeo could not establish state action. This appeal ensued.

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[2] In his complaint, Yeo also asserted a claim under the Equal Access Act, 20 U.S.C. §§ 4071-4074, but subsequently stipulated to this claim's dismissal with prejudice.

[3] See Yeo v. Town of Lexington, 39 F. 3d 1167, 1994 WL 649114 (1st Cir. 1994) (unpublished table decision).

[4] The defendants also sought summary judgment on other grounds that have not been raised or pressed on appeal.

The Constitutional State Action Issue

The Lexington town defendants contend that Yeo cannot prevail on his constitutional claims because he fails to demonstrate the existence of state action. They argue that the student editors of the school newspaper and yearbook made the decisions to reject the LEXNET ads and that Yeo cannot demonstrate that the student editors' decisions are attributable to the state. Yeo disputes this contention and argues both that a genuine issue of material fact exists with respect to whether the student editors made the decisions to reject the ads and that the refusals of the school newspaper and yearbook to print the LEXNET ads are, in any event, reasonably attributable to the state.

[2][3] A basic principle of our constitutional framework is that "[t]he constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state." Kay v. New Hampshire Democratic Party, 821 F.2d 31, 33 (1st Cir.1987) (quoting Hudgens v. NLRB, 424 U.S. 507, 513, 96 S.Ct. 1029, 1033, 47 L.Ed.2d 196 (1976)). Individuals are not protected from the acts of private parties or entities under either the First or Fourteenth Amendments to the U.S. Constitution or Article 16 of the Massachusetts Declaration of Rights. See Hudgens, 424 U.S. at 513, 96 S.Ct. at 1033 ("[W]hile statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself."); Shelley v. Kraemer, 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161 (1948) ("[The Fourteenth] Amendment erects no shield against merely private conduct, however discriminatory

or wrongful."); The Civil Rights Cases, 109 U.S. 3 11, 3 S.Ct. 18, 21-22, 27 L.Ed. 835 (1883) (interpreting the Fourteenth Amendment); Commonwealth v. Hood, 389 Mass. 581, 452 N.E.2d 188, 191 (1983) (" '[Art. 16] protect[s] the rights of free speech ... from abridgment by the government.' ") (quoting Commonwealth v. Noffke, 376 Mass. 127, 379 N.E.2d 1086, 1090 (1978)).[5]

[4] The importance of the state action requirement in this case is clear. Yeo simply cannot prevail on his constitutional claims if the refusals by the school newspaper and yearbook to print the LEXNET ads are not fairly attributable to the Town of Lexington. Based on our review of relevant precedent and the undisputed record evidence before us, we conclude that the Musket and the Yearbook did engage in state action to the extent they bore the imprimatur of Lexington High School. Their refusals to print the LEXNET ads thus constituted state action.

***5** In reaching its contrary result, the district court relied primarily on a 1982 Supreme Court case and a 1987 case from the Eighth Circuit. See Rendell-Baker v. Kohn, 457 U.S. 830, 840-42, 102 S.Ct. 2764, 2770-72, 73 L.Ed.2d 418 (1982); Sinn v. Daily Nebraskan, 829 F.2d 662, 665 (8th Cir. 1987). We

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[5] Yeo claims both federal and state constitutional rights of access in this case. Because the state action requirements of the Massachusetts Constitution largely mirror those of the U.S. Constitution, we focus our opinion today on federal case law as developed by the Supreme Court. See Hood, 452 N.E.2d at 191 (the Massachusetts Supreme Judicial Court explaining that it "relied on Federal constitutional law" in reaching its conclusion that " '[Art. 16 of the Massachusetts Declaration of Rights] protect[s] the rights of free speech ... from abridgment by the government.' ") (construing and quoting Noffke, 379 N.E.2d at 1090).

believe that the district court and the litigants' reliance on these cases is misplaced. In particular, we reject the town and town officials' contentions that these cases are "factually indistinguishable" from the case at bar.

Unlike the present dispute, Rendell-Baker involved teacher discharges from a private, special-needs high school, while Sinn involved a college newspaper at a state-supported university. Whatever helpful insights these cases may provide by way of analogy towards our understanding of the present matter, they are factually distinguishable and thus do not form the precedential touchstone against which we must weigh the legal merits of the controversy before us. Supreme Court precedent that directly addresses the unique set of constitutional concerns that public high school publications raise provides this touchstone. The seminal case in this area of law is the Court's decision in Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988).[6] See Student Gov't Ass'n v. Board of Trustees of Univ. of Mass., 868 F.2d 473, 480 n. 6 (1st Cir.1989) (distinguishing Hazelwood, as a high

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[6] See J. Marc Abrams & S. Mark Goodman, End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier, 1988 Duke L.J. 706 (arguing that Hazelwood recast a generation of lower-court decisions by "sharply limit[ing]" the rights of students operating school sponsored publications); Bruce C. Hafen, Comment, Hazelwood School District and the Role of First Amendment Institutions, 1988 Duke L.J. 685, 685, 687 (arguing that Hazelwood "is probably the most significant free speech case involving public school students" since the 1960s, because it granted schools greater discretion and decision making authority over student edited publications and signaled a shift in the Court's jurisprudential stance away from its earlier propensity to countenance "the expansion of individual rights in derogation of all forms of institutional authority").

school newspaper case, from decisions applicable to college newspapers).

[5] The Court in Hazelwood faced the task of determining how much editorial control school officials could exercise over the contents of a public high school newspaper. The Court expended little effort in analyzing the state action issue, essentially proceeding on the assumption that state action exists where one confronts "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." Hazelwood, 484 U.S. at 271, 108 S.Ct. at 570. The Court reasoned that such "activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants or audiences." Id. The Court indicated that one may speak of the school as the school newspaper's "publisher" when faculty members supervise and train students involved in producing a public school publication. Id. The Court explicitly differentiated the situation in which a student edited publication may reasonably be said to bear a public school's imprimatur from one in which school officials merely allow sales of an off-campus "underground" newspaper on a state university campus. Id. at 271 n. 3, 108 S.Ct. at 570 n. 3 (distinguishing the facts of Hazelwood from those present in Papish v. University of Mo. Bd. of Curators, 410 U.S. 667, 93 S.Ct. 1197, 35 L.Ed.2d 618 (1973)).

*6 [6] Using the Court's discussion in Hazelwood as our reference point, we consider the relationship between Lexington

High School and the two school publications in question: the Musket and the Yearbook. Nothing in the record evidence before us suggests that either publication escapes the reasonable perception that it bore the imprimatur of the school. To be sure, unlike the school paper in Hazelwood, neither the Musket nor the Yearbook seems to have been produced by students for academic credit, and neither publication was required to submit proofs to the school principal for his approval prior to publication. See id. at 268-69, 108 S.Ct. at 568-69. Nevertheless, school-paid faculty members supervised both the Musket and the Yearbook, and both publications were, as the town defendants admit, at least partly designed to impart knowledge about journalism and publishing to the student participants. We note that the town defendants describe the newspaper's faculty advisor, Sam Kafrissen, as 'a resource to the student newspaper staff [whose mission is] to facilitate both their learning experience and the successful publication of the Musket." As for Karen Mechem, the Yearbook's advisor, the town defendants explain that she "trains the student editors in the technical issues involved in publishing a Yearbook and makes herself available to provide guidance to the students upon request."

On these facts, Hazelwood instructs that both the Musket and the Yearbook may fairly be characterized as part of the school curriculum" because both publications "are supervised by faculty members and [are] designed to impart particular knowledge or skills to student participants." 484 U.S. at 271, 108 S.Ct. at 570. Indeed, "it is not at all unlikely that members of the public, parents of school children in particular, might reasonably perceive school-sponsored publications to bear the imprimatur of the school." Planned Parenthood of Southern

Nev., Inc. v. Clark County Sch. Dist., 941 F.2d 817, 828 (9th Cir.1991) (en banc) (internal quotations omitted). Because Lexington High School is a public secondary school, the refusals by the Musket and Yearbook to print the LEXNET abstinence ads constituted actions attributable to the state.

Several additional facts reinforce this conclusion. First, the high school's principal controlled the bank checking accounts of both publications.[7] Moreover, the principal's affidavit indicates that he and other Lexington school officials retained authority and discretion over what the school publications would publish and that they were prepared to exercise such authority in cases involving a student desire to publish obscenity or other illegal material. In addition, the newspaper was largely funded with monies from the public fisc. Finally,

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[7] Citing several cases , including Rendell-Baker, the town defendants argue that Principal Wilson's authority over the checking accounts "is of no consequence to the state action analysis." We find their argument on this point singularly unpersuasive because the cases they marshal all involve public funding of private entities and none involve state control of an entity's bank account. It is one thing for the government to have the power to cut off funding to a group and quite another for the government to own the purse, strings and all. Cf. University of Rhode Island v. A.W. Chesterton Co., 2 P.3d 1200, 1214 (1st Cir.1993) ("[T]he hand that holds all the purse strings presumably controls the dependent entity.") (emphasis omitted). In the latter case, the entity in question is little more than a subdivision or arm of the government. The town defendants' inability or refusal to recognize this fact perhaps explains their heavy reliance on Rendell-Baker, which addresses the issue of how much state involvement and support is needed before the actions before a private entity's actions can be fairly attributed to the state. See 457 U.S. at 838 & n. 6, 102 S.Ct. at 2769-70 & n. 6. The situation here forces us to face the opposite question: how little state involvement is needed before the actions of a public high school's newspaper and yearbook can no longer be fairly attributed to the state?

both publications' faculty advisors received school salary supplements of several thousand dollars annually based on the additional responsibilities associated with their respective positions relative to the publications.

*7 [7] We note that the town defendants and the dissent operate on the assumption that these were "student" publications that were only tangentially and in unimportant ways involved with Lexington High School. The record is pellucid that that assumption is contrary to fact. These were not the students' private publications. First and foremost they were the school newspaper and the school yearbook. Contrary to the town defendants' and the dissent's impassioned views of the matter, it is not at all clear to us that student editors can properly be viewed as wholly private actors when they act as representatives of public school publications that bear the imprimatur of the school and are disseminated to the public as such.[8]

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[8] The main thrust of the town defendants'--and the dissent's--argument is that the student editors of the school newspaper and yearbook independently made the decisions to reject the LEXNET ads, and that the students' decisions are not attributable to the state. This simply does not comport with the record evidence, which we must view in the light most favorable to the non-moving party, i.e., Yeo. We note that both Kafrissen and Mechem wrote to Yeo to explain their respective publication's refusal to publish the LEXNET ads. In so doing, both faculty advisors used the pronoun "we" in referring to their respective publications. When deposed about this practice, Kafrissen and Mechem each indicated that they used the word in the sense of the "royal 'we,' it and that their use of such language in their letters to Yeo should not be taken at face value to suggest that they included themselves in the decision making bodies that rejected the LEXNET ads. These bodies, they contend, were composed solely of students.

Beyond straining the ordinary usage of language, ample contrary evidence exists in the record to contradict these asseverations regarding the "royal 'we' " and the identity of the relevant decision makers. For instance,

Kafrissen indicates that he had used his position of authority on previous occasions to influence student decisions regarding the paper's content, threatening "[o]n one occasion, for example," to resign if he did not have his way on a certain publication decision. The students ultimately capitulated, the advisor's view prevailed, and the paper went out as Kafrissen desired. By Kafrissen's own admission not an isolated or atypical incident, this feature of the Musket's institutional history, as recounted in Kafrissen's affidavit, helps to depict the relationship that existed between Kafrissen and the paper's student editors. Together with the fact that Kafrissen already had assumed a prominent, public role in favor of the condom distribution policy and had lobbied for it before the Lexington School Committee, this element of the record evidence belies the suggestion that independently-minded students uninfluenced by Kafrissen made the decision to reject the ad. On the contrary, this record evidence indicates that Kafrissen's opinion bore great weight with respect to publication decisions and that the Musket's student editors were not decision makers acting in a vacuum. Moreover, the record not only indicates that Mechem, acting as the Yearbook's faculty advisor, conferred with Kafrissen regarding the LEXNET ads, but also that Superintendent Young, at Kafrissen's request, convened meetings of the Musket and Yearbook advisors and student editors that were attended by the school's principal and assistant principal. Such joint strategizing and conferring among public officials, like the use of the word "we," is not indicative of actions taken by students acting independently of faculty supervision. In fact, unlike the dissent, the town defendants acknowledge that the school officials, far from playing no role whatsoever in the decisions of the Musket and Yearbook not to publish the LEXNET ads, "support[ed] the students' right to decide." At the very least, the record establishes that the town defendants cautioned the students, but ultimately gave them a green light to go ahead and do whatever they wanted. The totality of such activities does not seem like inaction so much as action. We find the dissent's "inaction" argument to be largely beside the point and to belie the record, which amply documents the significant extent of the school officials' involvement in this matter.

Our resolution of the state action question, however, does not depend on a factual resolution of this issue. Our analysis would not change even if the town defendants convinced us that the student editors rejected the ads independently of Kafrissen, Mechem, Wilson, Young, and the other school officials with whom they were in close contact. We thus believe that the dissent either misreads or miscomprehends our opinion today. Government

Finally, we reject as meritless the town defendants' argument that Mass. Gen. Laws ch. 71, § 82 precludes a finding of state action. The statute provides that the "right of students to freedom of expression in the public schools ... shall not be abridged" and defines the freedom to include students' individual and collective right to "write, publish, and disseminate their views." Mass. Gen. Laws ch. 71, § 82(b). The statute further provides: "No expression made by students in the exercise of such rights shall be deemed to be an expression of school policy and no school officials shall be held responsible in any civil or criminal action for any expression made or published by the students." Id. The town defendants argue that this statutory language not only prevented them from resisting the wishes of the student editors to reject the ads, but, in fact, made it illegal for them to do so. This fact, together with the critical role that the student editors played in rejecting the LEXNET ads, they contend, insulates them from liability and prevents this court from viewing the refusal of the ads as action fairly attributable to the state.

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cannot say that its behavior cannot be challenged because it was not acting independently, but rather was merely following "private" orders. Cf. Larkin v. Grendel's Den, 459 U.S. 116, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982) (establishment of religion ease); Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) (equal protection case). As we have said, Hazelwood teaches us that both the Musket and the Yearbook "may fairly be characterized as part of the school curriculum." 484 U.S. at 271, 108 S.Ct. at 570. It is no defense for the defendant town and town officials to argue that they are not responsible or accountable for decisions pertaining to that curriculum because they afforded students some control over part of it.

It is by no means clear whether the Massachusetts state statute encompasses decisions regarding the acceptance or rejection of advertisements, but this is an issue we need not resolve.[9] Whatever the statute's scope, federal and Massachusetts constitutional law indicate that it must yield to the state action analysis that we have outlined above.

See U.S. Const., art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land ... any Thing in the ... Laws of any State to the Contrary notwithstanding."); Hood, 452 N.E.2d at 191 (indicating that Massachusetts relie[s] on Federal constitutional law" in analyzing the state action requirement of Art. 16 of the Declaration of Rights) (construing and quoting Noffke, 379 N.E.2d at 1090).

The town defendants' arguments regarding the student editors thus are unavailing as far as the state action issue is concerned. Importantly, they do not tend to lessen the reasonable perception that the school-sponsored, school-supported, and school-advised publications bore the imprimatur of the school--a consideration that the Supreme Court's decision in Hazelwood tells us should frame our analysis. Thus, we hold that the district court improperly granted summary judgment to the town

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[9] Responding to a question of state law that we certified to it, see Pyle v. South Hadley Sch. Comm., 55 P.3d 20, 22 (1st Cir.1995), the Massachusetts Supreme Judicial Court recently interpreted § 82 as affording high school students the freedom to engage in non-school-sponsored expression that may reasonably be considered vulgar, but causes no disruption or disorder. See Pyle v. School Comm. of S. Hadley, 423 Mass. 283, 667 N.E.2d 869, 872 (1996). The SJC's decision, however, does not involve nor does it address the right of student-edited, school sponsored publications to reject advertisements submitted to them.

defendants because the refusals of the Lexington High School publications to publish the LEXNET abstinence ads were actions fairly attributable to the Town of Lexington.

The § 1983 State Action Issue

***8** Our constitutional state action discussion leads us to the conclusion that state action also exists for 42 U.S.C. § 1983 purposes, since the same state action requirement applies for constitutional claims and actions brought under § 1983. See Rendell-Baker, 457 U.S. at 838, 102 S.Ct. at 2770 ("The ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights fairly attributable to the State?") (internal quotations omitted).

The Public Forum Issue

Having addressed the threshold state action requirement, we now turn to Yeo's arguments regarding his alleged federal and state constitutional rights of access to the advertising pages of the Musket and LHS Yearbook. Yeo's argument, in essence, "is based on the notion that when the state provides a communication forum generally open to the public, the state may not discriminatorily forbid the use of the forum by certain individuals because of the content of their proposed messages." Mississippi Gay Alliance v.. Goudelock, 536 P.2d 1073, 1080 (5th Cir.1976) (Goldberg, J., dissenting on other grounds). Evaluating the legal merits of Yeo's argument requires us to

do two things. First, we must determine whether the Musket and the Yearbook engaged in state action, which we have answered in the affirmative based on our Hazelwood analysis. Second, it requires us to ascertain whether the advertising sections of the school publications were public fora at the time the LEXNET ads were rejected.

The litigants do not dispute that LEXNET's abstinence advertisements are protected speech under the First Amendment and Article 16 of the Massachusetts Declaration of Rights.[10] Instead, the dispute revolves around Yeo's alleged right to have the ads he submitted on behalf of LEXNET printed in the Musket and Yearbook. This question requires that we "resolve whether the school newspaper [and] yearbook[ ] ... are forums for public expression." Planned Parenthood, 941 P.2d at 821; see also Hazelwood, 484 U.S. at 267,. 108 S.Ct. at 568 ("We deal first with the question whether [the school newspaper] may appropriately be characterized as a forum for public expression").[11]

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[10] Because this case involves an advertiser's asserted right of access to particular advertising space instead of an advertiser's asserted right to advertise in the first instance, and because it is not clear that the LEXNET ads constituted commercial speech per se, we need not address how much protection the LEXNET ads are afforded under the First Amendment in light of the Supreme Court's recent decisions in 44 Liquormart, Inc. v. Rhode Island, --- U.S. ---, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) and Rubin v. Coors Brewing Co., 514 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995).

[11] We believe the dissent's position regarding the inapplicability of the public forum doctrine is thus foreclosed by Hazelwood.

The Scope of the Relevant Forum

[8] In analyzing this question, we first note that Yeo sought access to the school publications' advertising sections. This fact requires us to focus our attention on whether the publications' ad spaces, not the entire publications, were public fora at the time the ads were rejected, because "the access sought by the speaker" identifies the relevant forum. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 801, 105 S.Ct. 3439, 3448, 87 L.Ed.2d 567 (1985).

The parties do not dispute that the facts of this case either permit or compel the disaggregation of the publications into component parts for purposes of discerning the existence of public/nonpublic fora. The parties disagree, however, on how to characterize the ad spaces in question. The town defendants, for instance, suggest that the Musket acted properly in giving Yeo the option of writing a letter to the editor. The Musket's rationale for allowing Yeo to write a letter when it would not publish his LEXNET ad was, in the words of Kafrissen's letter to Yeo on the subject, that the paper "long considered the Letters to the Editor section of the Musket,' but not its ad space, "to be a public forum." In advancing the argument about the letter-to-the-editor compromise, the town defendants thus grasp at what the Court in Cornelius laid out, namely that the relevant forum for First Amendment purposes in this case is not the publications per se, but rather their ad space, because their ad space is "the particular channel of communication" to which the speaker (here, Yeo) seeks to have access. Cornelius, 473 U.S. at 801, 105 S.Ct. at 3448; see also Planned Parenthood, 941 F.2d at 840 (dissenting opinion) (arguing that, under the analysis mandated by Cornelius, the advertising space

of a high school newspaper alone is the relevant forum to which a prospective advertiser seeks access); accord San Diego Comm. Against Registration and the Draft (CARD) v. Governing Bd. of Grossmont Union High Sch. Dist., 790 F.2d 1471, 1483 (9th Cir. 1986) (Wallace, J., dissenting).

The Type of Forum Created

*9 [9][10][11][12] Under well-established First Amendment jurisprudence, traditional public fora are "streets and parks which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' " Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S.Ct. 948, 954-55, 74 L.Ed.2d 794 (1983) (quoting Hague v. CIO, 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939) (opinion of Roberts, J.)). Designated public fora come into being when the government decides to open other property or avenues of communication " 'for indiscriminate use by the general public,' or by some segment of the public." Hazelwood, 484 U.S. at 267, 108 S.Ct. at 568 (quoting Perry, 460 U.S. at 47, 103 S.Ct. at 956). The government need not, however, open its property or channels of communication indiscriminately. It may restrict public use of a forum, for instance, by limiting its use to certain classes of speakers (say, student groups) or certain subjects (say, school board business), and thus create a limited public forum. See Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 --- - ---, 115 S.Ct. 2510, 2516-17, 132 L.Ed.2d 700 (1995); Cornelius, 473 U.S. at 802, 105 S.Ct. at 3448-49; Perry, 460 U.S. at 4546 & n. 7, 103 S.Ct. at 954-56 & n. 7; Widmar v. Vincent, 454 U.S. 263, 267-68, 102

S.Ct. 269, 273-74, 70 L.Ed.2d 440 (1981) (student groups); City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Employ. Relations Comm'n, 429 U.S. 167, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976) (school board business) While the government need not open its otherwise closed property or channels of communication in this way, "[o]nce it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set," and may not thereafter exclude speech from the property or means of communication in question except for reasons anchored in " 'the purpose served by the forum,' nor may it discriminate against speech on the basis of its viewpoint." Rosenberger, 515 U.S. at 1115, S.Ct. at 2517 (emphasis added) (quoting Cornelius, 473 U.S. at 806, 105 S.Ct. at 3451) (internal citations omitted).

[13][14][15][16] Thus, we must determine whether the advertising pages of the Musket and LHS Yearbook (not being traditional public fora), cf. Hazelwood, 484 U.S. at 267, 108 S.Ct. at 567-68, had been opened to the public during the academic year in question, 1993-94, either fully or in a more limited fashion.[12] To resolve this question, Supreme Court prece-

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[12] The town defendants argued for summary judgment in their favor on this issue and Yeo invites us to declare the ad sections of the Musket and the Yearbook public fora. Thus, while the district court's memorandum supporting its entry of summary judgment for the town defendants did not reach the public forum issue, and while the town and town officials attempt to persuade us to limit our review in this appeal to the state action issue, Yeo has raised this issue on appeal, and we find it properly before us. We may thus reach it even if the district court declined to do so. The town defendants are bound by the public fora arguments they raised below in favor of summary judgment, which are part of the appellate record.

Because there seems little, if anything, to be gained by remanding for additional factfinding (the facts in the case are essentially undisputed; what is in dispute is the legal consequences that attach to them), and because we

dent requires us to look to the government's intent or to governmental policy or practice. See id. ("[S]chool facilities may be deemed to be public forums only if school authorities have by policy or by practice opened those facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations.") (internal quotations and citations omitted); Cornelius, 473 U.S. at 802, 105 S.Ct. at 3449 ("The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."). The necessary governmental intent, policy, or practice, however, needs to be "clear." Hazelwood, 484 U.S. at 270, 108 S.Ct. at 569 (holding that the record evidence must demonstrate a " 'clear intent to create a public forum' ") (quoting Cornelius, 473 U.S. at 802, 105 S.Ct. at 3449). "If the [school] facilities have ... been reserved for other intended purposes, communicative or otherwise, then no public forum has been created." Id. at 267, 108 S.Ct. at 568 (internal quotations omitted).

***10** The Musket's written Advertisement Form for the relevant 1993-94 academic year advertised that the Musket was an

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review de novo applications of First Amendment standards to record facts, see Globe Newspaper Co. v. Beacon Hill Architectural Comm., 100 F.3d 175, 181 (1st Cir.1996); AIDS Action Comm. of Mass., Inc. v. MBTA, 42 F.3d 1, 7 (1st Cir.1994), the easiest and most appropriate course is for us to decide whether the advertising sections of the Musket and LHS Yearbook during the relevant periods described earlier were designated as limited public fora. Cf. United States v. Sepulveda, 102 F.3d 1313, 1315 (1st Cir.1996) (Fourth Amendment case) ("Since the facts are undisputed and we review probable cause decisions de novo, the easiest course is for us to decide ourselves whether the search of Sepulveda himself was valid.") (internal citations omitted).

"award winning" student newspaper that "has enjoyed extensive readership by youth and adults, [and] is widely distributed in Lexington High School as well as the Lexington school community." The form explained that the paper "provides area businesses and non-profit organizations the opportunity to place advertisements in the Musket." The form also stated that the paper charged businesses a rate of $2.50 per square inch of ad space, but did not charge for ads for non-profit organizations. Nothing in the form acknowledged any further limitation on who was permitted to advertise in the newspaper and, apart from a brief mention that ads could be edited for length, the form made no mention of a policy that acceptance of ads would be conditioned upon the student editors' approval.

[17] The record evidence establishes that many of those solicited took advantage of the Musket's ad facilities. As the district court noted in its summary judgment order and memorandum, the undisputed facts show that the Musket "ha[d] accepted advertisements for banking services, pizza, driving school classes, tuxedo rentals, and class rings." As the district court further wrote, the undisputed facts show that the Yearbook "ha[d] accepted congratulatory messages submitted by students and parents and advertisements placed by local businesses and businesses catering to student needs." The record indeed demonstrates that the Yearbook accepted commercial ads from sources similar to those advertising in the Musket, but also reveals that the Yearbook included ads that had no congratulatory message whatsoever, like those from an antiques dealer, which simply listed a business name and place, and a licensed psychologist, simply communicated that she offered counselling services to adults, individuals, and cou-

ples.[13] The record also indicates that some of the student ads in the Yearbook contained off-color messages of a sexually suggestive nature. The record further indicates that neither publication, to the best of anyone's knowledge, had ever rejected any proffered ad, regardless of content. Despite what the town defendants and the dissent would have us believe, the record facts thus indicate that both publications evidenced and acted upon a "clear intent" to open their advertisement sections to at least a segment of the public, specifically commercial businesses, non-profit organizations, and members of the school community.[14] See Hazelwood, 484 U.S. at 270, 108 S.Ct. at 569-70; Cornelius, 473 U.S. at 802, 105 S.Ct. at 3448-49.

The town defendants argue that the two publications did not reveal any intent to create a public forum. Their position is that both school publications: (1) maintained policies dictating that all ads were subject to final approval and acceptance by the student editorial boards (a situation, at least with regard to the Musket, of which Yeo was made aware upon his request

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[13] The record does not support the dissent's characterization of the Yearbook's advertising section as one exclusively devoted to congratulatory messages or a commemorative purpose. While certainly a great many ads in the Yearbook were congratulatory or commemorative in some way, others were predominantly solicitations from area businesses, organizations, and at least one health professional aimed at students, parents, teachers, and other members of the school community.

[14] The dissent appears to argue that Yeo, in any event, does not fit within any of these categories. Beyond being the head of LEXNET, a non-profit civic organization, the record shows that Yeo was a parent and active member in the school community well before this incident transpired. We are thus puzzled by and cannot accept the dissent's view of Yeo as "someone outside" the relevant--in its terms, "immediate"--school community.

for advertising rates), (2) had policies against acceptance of any political or advocacy ads, and (3) had maintained practices consistent with these policies in that they had never published any political or advocacy ads. The town and town officials contend, therefore, that the advertising spaces in the Musket and the Yearbook were nonpublic, and, thus, that the publications' decisions to reject the LEXNET abstinence ads are not subject to strict scrutiny. We disagree.

*11 [18] The town defendants' assertion of plenary editorial control over the advertising space is fundamentally mistaken because it

> assumes that government officials may create a nonpublic forum and escape strict scrutiny merely by declaring their intent to control content as they see fit. [On the theory argued by the school officials, s]o long as government reserves for itself broad, better yet, unbridled, discretion to censor expression, then it will be deemed to have intended to create a nonpublic forum, and its content-based exclusions will escape strict scrutiny. Planned Parenthood, 941 F.2d at 831 (7-4 en banc decision) (Norris, J., dissenting) (writing for four judges).

In Planned Parenthood, a case involving a family planning group's claimed right to advertise in a high school newspaper and other publications, the Ninth Circuit majority denied access and adopted the position that school-sponsored publications do not display the requisite intent to create a public forum (as mandated by Hazelwood and Cornelius) where they open their ad pages to the Public but retain discretion to deny any ad submitted by a business or individual that is not in the school's "best interest". Id. at 824.

While selective access to government facilities does not a public forum make, see Perry, 460 U.S. at 47, 103 S.Ct. at 956, we cannot accept the proposition that government can selectively, and with sole and absolute discretion, open its facilities communication along purely content-based lines, and thus determine to admit the messages it likes and choose to exclude the messages it dislikes on no basis beyond the messages' content. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." Rosenberger, 515 U.S. at ___, 115 S.Ct. at 2516. As we have noted, "[o]nce the state has created a forum, it may not condition access to the forum on the content of the message to be communicated." Student Gov't Ass'n, 868 F.2d at 480. Binding Supreme Court precedent explains that unmoored "selectivity" is constitutionally abhorrent: "selective exclusions in a public forum may not be based on content alone, and may not be justified by reference to content alone." Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972); see also Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553, 95 S.Ct. 1239, 1244, 43 L.Ed.2d 448 (1975) ("[T]he danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use."). Accord Widmar, 454 U.S. at 267-68, 102 S.Ct. at 273-74. The Ninth Circuit's position reduces the Supreme Court's designated public forum doctrine to a circular nullity because it would allow government to use impermissible content-based exclusions not anchored to any intended reserved purpose for the forum as conclusive proof that the forum is not open to the public, thereby allowing the content-based exclusions to survive less stringent reasonableness review.

***12** We thus reject the Ninth Circuit majority's position because it misconstrues Perry, a seminal case in the Supreme Court's public forum jurisprudence that postdates the Lehman plurality, upon which the dissent so heavily relies.[15] Perry al-

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[15] See Lehman v. City of Shaker Heights, 418 U.S. 298, 299-304, 94 S.Ct. 2714, 2715-18, 41 L.Ed.2d 770 (1974) (plurality opinion) (Blackmun, J.). As to the newspaper, we do not read Lehman to support the conclusion the dissent would have us reach. While the dissent correctly argues that the Lehman plurality upheld the right of public authorities to control some controversial advertising, its Lehman-based argument is inapposite for at least two reasons. First, the Lehman plurality, importantly, went out of its way to note that the city in question had consciously taken steps to establish policies and practices governing access to the transit system's ad space that prevented arbitrary and capricious determinations regarding such access. See 418 U.S. at 303- 04, 94 S.Ct. at 2717-18 (plurality opinion). The school publications in this case instead cleaved to a policy of reserved and unbridled discretion. As the record indicates, and as the district court was convinced, the newspaper rejected the LEXNET ad not because it violated any newspaper ad policy, but instead "solely for its controversial content." (emphasis added). Nothing in the Lehman plurality supports this kind of action from an entity whose acts are fairly attributable to the state. Lehman involved rejections that were made in accordance with a clearly articulated policy where what was challenged was the ability of a city to ban partisan political ads in toto. On the facts before us, that situation simply does not pertain in this case, the town defendants' arguments to the contrary notwithstanding.

Second, the dissent misreads and misapplies Lehman to the facts present here. The Lehman plurality noted that a transit system's decision to limit ads aimed at a captive authence "to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation." Id. at 304, 94 S. Ct. at 2718 (emphasis added). The dissent's argument thus overlooks that Lehman does not address itself to decisions to target or exclude "innocuous and less controversial ... service oriented advertising," which, on the contrary, it indicates are protected speech. Here the rejected LEXNET ads--by any stretch of the imagination--fall well within the category of innocuous or less controversial advertising that Lehman itself protects. The all-text ads were no different in appearance than many other ads that the publications had pub-

lished and incorporated no images or language that could even remotely be said to be inappropriate for high school minors. The ads in question can only be characterized as innocuous, moreover, because they are fully consistent with and supportive of the school's message on teenage sex, which professes the view that, even as compared to sex with a condom, sexual abstinence remains the surest method of avoiding sexually-transmitted diseases. As the record discloses, the condom package that was freely distributed to Lexington High School students was printed with the following message in large letters: "THE BEST WAY TO PROTECT YOURSELF FROM AIDS AND OTHER SEXUALLY TRANSMITTED DISEASES IS TO NOT HAVE SEX ... BUT IF YOU DECIDE TO BE SEXUALLY ACTIVE, THEN YOU'LL NEED THIS [CONDOM]." (emphasis in original). Viewed objectively, the source of the controversy surrounding the innocuous LEXNET ads is thus quite difficult to detect. While we appreciate the emotions that may have surrounded the condom distribution issue, even when viewed in this context we detect nothing within the four corners of the two ads in question that would lead us to consider that they were somehow comparable to the partisan political, and thus inherently controversial, ads at issue in Lehman, or that indicates that they somehow else fell within the category of controversial ads that Lehman suggests can be excluded from fora that have captive audiences, which we note is another Lehman element lacking in this case.

We thus believe that Lehman, if anything, supports the result we have outlined in today's opinion. Still, we are disinclined to rely on Lehman to the same extent as the dissent. In the first place, Justice Blackmun's opinion in Lehman did not command a majority and subsequent decisions and statements from the Court indicate that its reasoning regarding the selective regulation of speech based on content, the proposition for which the dissent relies on it, may very well fail to command a majority of the Supreme Court today. See R.A.V. v. St. Paul, 505 U.S. 377, 390 n. 6, 112 S. Ct. 2538, 2547 n. 6, 120 L.Ed.2d 305 (1992). Compare Lehman, 418 U.S. at 299-304, 94 S.Ct. at 2715-18 (partisan political ads) with Rosenberger, 515 U.S. at --- - ---, 115 S.Ct. at 2516-20 (finding that public universities cannot create a funding mechanism for student activities, thereby establishing a limited public forum, but select not to fund student groups with proselytizing, religious purposes) and Rosenberger, 515 U.S. at 115 S.Ct. at 2551 (Souter, J., dissenting) (arguing that the Court's "holding amounts to a significant reformulation" of Supreme Court precedents that "will significantly expand access to limited-access forums") (discussing, inter alia,

lows a state actor either to "reserve [its] forum for ... intended purposes" (thereby retaining the nonpublic nature of the forum or making it a "limited purpose" forum), or to impose "[r]easonable time, place and manner regulations." 460 U.S. at 46 & n. 7, 103 S.Ct. at 955-56 & n. 7. Perry makes it clear that "content-based prohibition[s]" that are not linked to any "intended purposes" for the forum "must be narrowly drawn to effectuate a compelling state interest." Id. at 46, 103 S.Ct. at 955 (citing Widmar, 454 U.S. at 269-70, 102 S.Ct. at 274). Perry goes on to make clear that even state actors who reserve a forum for intended purposes can regulate speech only "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." Id. (emphasis added). Accord Rosenberger, 515 U.S. at 1115, S.Ct. at 2517. Perry thus indicates that state actors cannot avoid having a forum declared open to the public by the argument, essentially, that they only intended to open the forum to messages that they alone were to deem appropriate and acceptable. Supreme Court precedent thus indicates that the Ninth Circuit's approach is erroneous and that the dissenting opinion for four judges in Planned Parenthood is a more cogent and accurate analysis of the Court's public forum doctrine as it intersects with the legal and factual wrinkles presented by cases involving advertising space in

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Lehman). Second, Lehman predates all the main Supreme Court cases on which our opinion principally relies, namely Perry, Cornelius, Conrad, and Hazelwood. We are reluctant to reach all the way back to Lehman to build an analysis that seems to be at odds not only with that plurality decision, but also with more recent controlling First Amendment precedents.

public high school publications. See 941 F.2d. at 830-44 (dissenting opinion).

Were we thus to accept the view that the defendant town and town officials advocate, we would be conferring judicial approval upon a category unknown in the Supreme Court's public forum doctrine, namely, a forum otherwise open to the public in which the entity engaging in state action could perpetually justify content-based exclusions by simply saying that the exclusion is not only permissible, but also determinative of whether the forum is public or nonpublic. Such an end-run around the public forum doctrine and the constitutional values it serves to protect is impermissible. See Mosley, 408 U.S. at 96, 92 S.Ct. at 2290 ("[S]elective exclusions in a public forum may not be based on content alone, and may not be justified by reference to content alone."); Student Gov't Ass'n, 868 F.2d at 480 ("Once the state has created a forum, it may not condition access to the forum on the content of the message to be communicated.").

*13 [19] In arguing their position, the town defendants and the dissent conflate the "intent to create a public forum" that Hazelwood and Cornelius require of entities engaging in state action, with intent by such entities to control content. The first expression of intent is not only permissible but necessary to a finding that a public forum exists. See Hazelwood, 484 U.S. at 270, 108 S.Ct. at 569-70; Cornelius, 473 U.S. at 802, 105 S.Ct. at 3448-49. The second expression of intent, however, is impermissible and thus incapable of dictating the determination of whether a forum is public or nonpublic. See Conrad, 420 U.S. at 553, 95 S.Ct. at 1243-44; Mosley, 408 U.S. at 96, 92 S.Ct. at 2290. Viewed properly, a dispute over access to

government facilities or avenues of communication requires a court to examine

> whether government opened up the forum [in question] indiscriminately to the public, thereby manifesting its intent to create a limited public forum, or reserved that forum for a specific, lawful purpose and excluded expression incompatible with that purpose, thereby manifesting its intent to create a nonpublic forum. Planned Parenthood, 941 F.2d at 844 (dissenting opinion).

[20] At the core of the advertisement restriction policies at issue in this case is the claimed unbridled discretion of the two school publications to reject any ad. Such unfettered discretion is impermissible under Supreme Court precedent. See Conrad, 420 U.S. at 553, 95 S.Ct. at 1243-44. It is one thing for an entity engaging in state action to reserve a forum for a specific, lawful purpose and then to exclude from the forum only expression that is incompatible with that purpose (as the Court found was the case in Cornelius, Perry and Hazelwood); it is another thing for a state entity to "open[ ] up its facilities indiscriminately with no specific purpose that narrow[s] its discretion to engage in [impermissible] content control." Planned Parenthood, 941 P.2d at 832 (dissenting opinion). Put simply, state actors cannot open their facilities and other avenues of communication to the public and yet seek to retain unbridled discretion to refuse a proposed use of the forum for any reason they subsequently deem sufficient. See Rosenberger, 515 U.S. at --- 1115, S.Ct. at 2517 (explaining that "content discrimination ... may be permissible if it preserves the purposes of that limited forum") (emphasis added) (citing Perry, 460 U.S. at 46, 103 S.Ct. at 955-56). The Supreme "Court has felt obliged to condemn systems in which the exer-

cise of such authority [over a form's use] was not bounded by precise and clear standards." Conrad, 420 U.S. at 553, 95 S.Ct. at 1244.

*14 The First Amendment does not permit such arrangements because they do not protect against the risk that government will restrict expression based on its subject matter or viewpoint. Supreme Court precedent and common sense dictate that the risk of content-based or viewpoint discrimination increases when no adequate safeguards circumscribe otherwise unbounded government discretion over use of a public forum. See Conrad, 420 U.S. at 553, 95 S.Ct. at 1244 ("[T]he danger of censorship and of abridgement of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use."). Accord Widmar, 454 U.S. at 267-8, 102 S.Ct. at 273-74; Niemotko v. Maryland, 340 U.S. 268, 272, 71 S.Ct. 325, 327-28, 95 L.Ed. 267 (1951).

[21] This case presents an example of an impermissible attempt by a state actor to retain unbridled discretion over a forum it has opened to the public. The Musket's description of its ad policy in the rejection letter it sent to Yeo is unequivocal on this point: "the Musket reserves the right to select what Advertisements it chooses to print." Supreme Court precedent is clear: the Musket cannot so pick and choose absent the articulation of some purpose or rationale that could be used to circumscribe and constrain discretion that would otherwise be arbitrary and unbridled. See Niemotko, 340 U.S. at 272, 71 S.Ct. at 327 ("it is clear that all that has been said about the invalidity of such limitless discretion must be equally applicable here."). Put differently, state actors may regulate access to a public forum and in so doing exclude certain speakers, but

the rationale for exclusion, assuming it is permissible, must flow from "the purposes of that limited forum" and be stated up front ("the State must respect the lawful boundaries it has itself set") in such a way that state actors' discretion is effectively bounded and regulated by neutrally applicable criteria. Rosenberger, 515 U.S. at ___, 115 S.Ct. at 2517; see also Perry, 460 U.S. at 46, 103 S.Ct. at 955-56; Conrad, 420 U.S. at 553, 561, 95 S.Ct. at 1244, 1247-48; Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51, 89 S.Ct. 935, 938-39, 22 L.Ed.2d 162 (1969); Cantwell v. Connecticut, 310 U.S. 296, 305, 60 S.Ct. 900, 904, 84 L.Ed. 1213 (1940) (unanimous decision).

The town defendants and the dissent attempt to deflect the thrust of these constitutional arguments against their position by arguing that the publications respectively rejected Yeo's ads not on the basis of unfettered discretion, but instead on the basis of a policy of refusing political or advocacy ads. The defendants point out, as evidence of such policies, that the publications had never published such ads prior to Yeo's submission of the LEXNET ads.

The district court accepted the town defendants' alternative characterization of the publications' advertising policies.[16] We need not determine whether the record supports the district court's view on this point because the issue does not constitute a material fact to the dispute between the litigants as far as the

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[16] In its summary judgment order and memorandum, the district court noted that during the relevant academic year (1993-94) the Musket had an unwritten policy of refusing political or advocacy ads, while the Yearbook maintained a practice of not publishing such ads.

relevant 1993-94 academic year is concerned.[17] That is, the record evidence shows that the LEXNET abstinence ads were not refused ultimately on the grounds that they were political or advocacy ads that violated some policy, but instead were rejected because the school publications deemed them objectionable or controversial. In its March 1, 1994 letter to Yeo, for instance, the Musket explained that it recently had

> *15 rejected an application that you filed with us for an advertisement in the next issue of the paper. It was our understanding at that time that your organization, Lexnet, was a political organization, and the Musket has a standing policy not to accept advertising for any political organization or candidate. Since that rejection we have been informed that Lexnet is, in fact, not a political organization but rather a civic minded citizens group. Therefore, it is entirely possible that there is nothing in our advertising policy that would preclude us from running your ad.
>
> However, as we have looked into this issue more closely, it has come to our attention that a number of citizens both within and outside of the high school find both your organization and the message you propose to place in the paper objectionable. By running such an ad it might be

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[17] We note, however, that the Musket's advertisement form included no mention whatsoever of any policy limiting the publication of political or advocacy ads. To the extent the Musket communicated anything to Yeo about its policy regarding ads, it explained in a cover letter to him only that "ads are still subject to approval of the editorial board." The Yearbook communicated nothing to Yeo about any possible policy or practice against acceptance of advocacy or political ads. The only evidence in the record concerning the existence of any ad policy other than retained unbridled discretion comes from affidavits and the testimony of deposed party-witnesses.

> perceived that the Musket is endorsing the goals of your group....

[Emphasis added]. Such evidence properly convinced the district court that the Musket ultimately came to reject the LEXNET ad "solely for its controversial content." Memorandum and Order of April 22, 1996 at 8 n. 9 (emphasis added).

Similarly, the Yearbook did not refuse the LEXNET ad submitted to it because it was somehow not in keeping with an unwritten policy or practice of not accepting political or advocacy ads. Mechem's letter to Yeo, dated February 4, 1994, explained the Yearbook's refusal to print the LEXNET ad in no uncertain terms: "[b]ecause of the non-controversial nature of the advertising section of the yearbook, we have decided not to print [the] advertising you have submitted." We believe this explanation admits of no reasonable interpretation but one, namely that the Yearbook rejected the LEXNET abstinence ad because it, like the Musket, considered the message "controversial."

We thus do not ascribe any significance to the town defendants' argument that the ad spaces in question were not public fora because of 'the possible existence of certain unwritten policies or practices. The undisputed material facts in the record indicate that policies or practices allegedly in existence against political or advocacy ads did not form the basis for rejecting these ads.[18] The record demonstrates that the ads were

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[18] Even if we were to view these ads through the nopolitical-or- advocacy-ads rubric of the town defendants and the dissent, our analysis would yield the same result. First, we cannot detect anything political in these ads, which is presumably why the Musket subsequently wrote to Yeo to explain that closer inspection revealed "nothing in our advertising policy that would preclude us from running your ad." Second, as to the advocacy

instead rejected because the Musket and Yearbook deemed them controversial. See AIDS Action Comm. of Mass., Inc. v. MBTA, 42 F.3d 1, 11-12 (1st Cir.1994) (refusing to condone the rejection of advertisements on public subway cars where it was "easily infer [red]" that the ads were "screened not because they threat[ened] to violate the [transport authority's] Policy but because they appear[ed] likely to generate controversy").

We detect a sense of confusion on the part of the town defendants between policies that, on the one hand, serve to define the scope of a limited public forum and statements concerning forum purposes that, on the other, serve to prevent a finding that a public forum has been created. If, for instance, in opening school facilities for use by the public, those "facilities have ... been reserved for other intended purposes, 'communicative or otherwise,' then no public forum has been created." Hazelwood, 484 U.S. at 267, 108 S.Ct. at 567-68 (quoting Perry, 460 U.S. at 46, n. 7, 103 S.Ct, at 955, n. 7). The town defendants' no advocacy-or-political-ads argument, therefore, does not address the issue of whether a limited pub-

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issue and the Yearbook, we note that even if one were to ignore the record, which indicates that the Yearbook published ads from businesses that had no congratulatory or commemorative message, and were to focus solely on the submitted LEXNET ad, one gleans nothing that is incompatible with any possible congratulatory-ads-only policy that the town defendants and the dissent argue was in existence. Every ad by necessity advocates or expresses something, but the LEXNET ad, written from the standpoint of a parents' group, tells students, "We know you can do it! ABSTINENCE: The Healthy Choice." The language, tone, and message of the ad are in no way incompatible with messages designed to congratulate, encourage, or otherwise celebrate the youth of Lexington High School.

lic forum existed or not. The existence of a policy or practice against political or advocacy ads merely would tend to delineate that segment of the public, or that category of speech, that the public forum in question entertains or turns away.

***16** In reviewing the record, we find no intended purpose for the fora at issue here other than (1) the collection of revenue, or (2) the creation of a means of effective communication among businesses, noncommercial entities, and members of the LHS community. Both publications charged businesses for commercial speech aimed at informing students and other readers of the goods or services that the advertisers were capable of providing. The Musket also had a policy and practice of publishing ads for nonprofit organizations at no charge. The record reflects no evidence, however, that the publications published ads for any instructional purposes relating to the education of its student editors.

In Hazelwood, the Supreme Court concluded that the school intended to reserve the copy space of its curricular newspaper for use consistent with an intended purpose that the paper be a "supervised learning experience for journalism students." 484 U.S. at 270, 108 S.Ct. at 569. The Court, therefore, had no trouble finding that the school's specific, articulated concerns precluded the conclusion that the school intended to open the news section of the school newspaper to the public and turn it into a public forum. The Court found nothing improper in excluding from such a forum material that was reasonably and legitimately incompatible with the purpose for which the forum was intended. See id. at 273, 108 S. Ct. at 57 1.

The situation in Hazelwood, however, is not analogous to this case. Hazelwood involved students' asserted right to select certain articles for publication in a public school newspaper free of school officials' objections. Moreover, the forum in question was opened to students for a specific educational purpose. The Court determined that the newspaper constituted a nonpublic forum and ruled that school-imposed restrictions on proposed news articles were permissible to the extent that they were rationally related to the forum's reserved educational purpose. Hazelwood, 484 U.S. at 271-73, 108 S.Ct. at 570-71. Here, we have an apparent assertion of an unbridled right of student-edited public school publications to refuse to publish ads in advertising sections that had been previously opened to large segments of the public (specifically, commercial businesses, non-profit organizations, and members of the school community) with no apparent restrictions or purpose in mind other than to raise money or to provide an effective forum for those interested in communicating messages to students and other members of the school community.[19]

Thus, we find that these advertisement sections were limited public fora at the time of the relevant events described earlier. We therefore conclude that the school publications' refusals to print the LEXNET ads in these spaces during the relevant 1993-94 academic year were permissible only to the extent that the rejections pass muster under a strict scrutiny analysis. See Perry, 460 U.S. at 46, 103 S.Ct. at 955. ("Reasonable

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[19] The dissent does not recognize that the publications generally opened their ad pages to the public without any discernible standards and then decided that these particular ads were objectionable. Contrary to the dissent's characterization, our opinion does not conclude that the school publications opened their ad spaces to the public merely because they ran some ads.

time, place, and manner regulations are permissible [in a designated public forum, but] ... a content-based prohibition must be narrowly drawn to effectuate, a compelling state interest.").

*17 We do not express any opinion whether the Musket and Yearbook advertisement sections have since been closed to the public. In its summary judgment order and memorandum, the district court indicated that the Musket adopted a formal, written policy barring any political or advocacy advertisements beginning with the 1994-95 school year, but consistent with that policy apparently also retains the right to reject any ad submitted to it for publication. If this is indeed the case, our holding today would indicate that the newspaper's ad section remains open to the extent it still bears the characteristics we have identified. As for the Yearbook, the district court indicated that beginning with the 1994-95 school year it adopted a formal policy of limiting ads to congratulatory messages from students and parents of graduating LHS seniors. If this is the case, our holding today would indicate that the Yearbook ad section has been closed to the public, except as to the groups and subjects specified. Because these facts are not fully developed in the record before us, we leave the final resolution of these issues to the district court on remand.

It should be understood that our holding today does not stop public school publications "from banning ads for liquor, drugs, X-rated movies or other products inappropriate for minors. Banning ads for such products would easily pass First Amendment muster, either under strict scrutiny or reasonableness review." Planned Parenthood, 941 F.2d at 844 (dissenting opinion). It should further be understood that school publications that wish to solicit advertisements can do so without fear

that they will lose control over their ad spaces or render them, as the dissent charges, into bulletin boards for warring political and social viewpoints. Our holding today primarily addresses the problem of decisions to reject ads made pursuant to policies purporting to give state entities unbridled discretion over access to public fora. Our holding does not address the situation in which ads are permissibly refused according to a "rational and [content-]neutral policy, implemented in a non-discriminatory fashion." AIDS Action Comm., 42 F.3d at 12. Our ruling today permits school publications to winnow out the chaff, but it requires them to do so with a legitimate reserved purpose in mind and in accordance with clearly articulated procedural safeguards that protect against the risk of constitutionally disfavored content-based or viewpoint censorship. When government entities open their facilities or avenues of communication to the public, they "cannot shut them discriminatorily to a few without satisfying the most stringent constitutional safeguards." Planned Parenthood, 941 F.2d at 844 (dissenting opinion).

Nothing in the LEXNET ads seems incompatible with the ad sections' apparent dual purposes of raising money and providing effective channels of commercial and non-profit information to the LHS community. Yeo insisted on paying for the ad that he submitted to the Musket even though LEXNET, as a non-profit organization, apparently qualified for the Musket 's no-charge policy. In addition, the record does not suggest that the school publications permissibly sought to refuse the LEXNET ads so as to maintain their neutrality on a controversial issue and to avoid lending the imprimatur of the school to one side over another. See Planned Parenthood, 941 P.2d at 830 (majority opinion) (finding the maintenance of neutrality

to be a permissible rational basis on which to reject a family planning ad submitted to a high school newspaper). Specifically, the Musket had assumed a strong editorial stance in favor of a "safe sex" condom distribution policy. To argue that the paper refused the LEXNET ad on the ground that it wanted to avoid taking sides and lending the imprimatur of the school to one side of a controversial issue thus is a specious argument. While equal access for alternative viewpoints in the ad section is not compelled by the paper's editorial stance, the paper cannot logically justify a decision to exclude Yeo's ad on the ground that it wanted to avoid lending the school's imprimatur to one side of a controversial debate when it itself had already done so.

***18** [22][23] In any event, as we noted earlier, the record demonstrates that the school publications, by their own admissions, ultimately rejected the LEXNET abstinence ads because they found them to be "objectionable" or "controversial." Because the all text LEXNET ads were no different in appearance than many other ads the publications had published and incorporated no images or language that could even remotely be said to be inappropriate for high school minors, and because the Musket had previously run numerous stories, cartoons, and editorials in favor of "safe sex" condom distribution, this stated rationale "gives rise to an appearance of viewpoint discrimination." AIDS Action Comm., 42 F.3d at 11. When "speech [that is] otherwise within the forum's limitation" is excluded, one necessarily faces the specter of "viewpoint discrimination," which is presumptively "impermissible." Rosenberger, 515 U.S. at ___, 115 S.Ct. at 2517 in any event, the Supreme Court has made clear that "avoidance of controversy is not a valid ground for restricting

speech in a public forum." Cornelius, 473 U.S. at 811, 105 S.Ct. at 3453-54. Accord Carey v. Population Serv. Int'l, 431 U.S. 678, 701, 97 S.Ct. 2010, 2024, 52 L.Ed.2d 675 (1977) ("[T]he fact that protected speech may be offensive to some does not justify its suppression.").

On the record before us, then, the school publications, at best, seem to have "shied away" from the sexual abstinence ads Yeo submitted 'because they feared [they] might be offensive to some people." Planned Parenthood, 941 F.2d at 842 (dissenting opinion). Such a decision cannot be invoked to preclude finding the existence of a public forum because it is disfavored under established constitutional norms. See Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 508, 89 S.Ct. 733, 737, 21 L.Ed.2d 731 (1969) ("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right of expression.").

Conclusion

The appeal Yeo has brought "is not the ordinarily encountered First Amendment case in which a ... student newspaper seeks to set aside an order directing it not to publish something which it wishes to publish. To then contrary it is a case in which a ... group ... seeks judicial compulsion against a student newspaper requiring publication of an advertisement which that paper does not want to publish." Mississippi Gay Alliance, 536 F.2d at 1074.

Because we find that the school publications in question reasonably bore the imprimatur of Lexington High School, we

conclude that the Musket and Yearbook engaged in action fairly attributable to the Town of Lexington. And, because it appears that the publications opened their advertising spaces to the public with no apparent, reserved, intended purposes beyond raising money or providing an effective means of communicating commercial, nonprofit, and personal messages to the LHS school community, we determine that the ad spaces in question, as a matter of law, constituted limited public fora under the public forum doctrine. On the evidence presented, we thus conclude that the district court erred in granting summary judgment for the defendants-appellees town and town officials.

*19 Reversed and remanded for further proceedings consistent with this opinion. Costs to appellant.
LYNCH, Circuit Judge, dissenting.

In the name of free speech, this court has dictated to student editorial boards of a high school student newspaper and yearbook what they must print. The school administrators, recognizing the students' editorial independence, did not interfere with their judgment. The result reached by the majority does not vindicate First Amendment interests, but undercuts them.

Public high school students who ran a newspaper and a yearbook with complete editorial independence from the school administration decided that they would not accept any advertising of a political or advocacy nature because they wished to avoid turning their advertising pages into camps for warring political and social viewpoints. The students' decisions cannot be said to implicate the Constitution unless those decisions involve state action. It is highly doubtful that the student-

controlled newspaper, or the yearbook, wields sufficient governmental power to warrant application of the First Amendment's strictures to them.

There was no First Amendment violation, even if there were some state action. The advertising section of the student newspaper is neither a public forum nor a limited public forum. The newspaper did not engage in viewpoint discrimination by refusing all advocacy advertising and its decision was eminently reasonable. It is even clearer that the yearbook is a non-public forum. The students' decisions did not violate the First Amendment.

The First Amendment presents a paradox on these facts. The First Amendment is meant to ensure free speech and free press rights against governmental interference. A claim is made challenging the decisions of private persons (here students) who do not wish to be engaged in or associated with particular speech. There are strong First Amendment interests on the defendants' side. In such instances, courts, which are supposed to vindicate First Amendment rights, are in danger of becoming the instruments of governmental interference with expression rights. The plaintiff seeks to have the federal government, through its courts, dictate what speech must be published. This is in conflict with the purposes of the First Amendment. I fear that this is the result here, and I respectfully dissent.

I. The Facts

A. The Publications

This case involves two distinct Lexington High School (LHS) student publications, the LHS Yearbook and the LHS Musket. The Yearbook was operated entirely by a staff of about sixty students; all editorial, business, and staffing decisions were made by students. During the 1993-94 academic year, this staff was headed by two co-editors-in-chief, Dow-Chung Chi and Natalie Berger. Karen Mechem, a LHS teacher, was the Yearbook faculty advisor. Mechem was paid a stipend of approximately $2000 for that activity. Apart from Mechem's stipend and the use of LHS buildings and facilities, the Yearbook is financially independent from the school and is funded entirely through the sale of the books to students.

*20 Like most yearbooks, the LHS Yearbook included pictures of seniors and other students, sections on sports, academics, and activities, and an advertisement section. This advertisement section was largely comprised of congratulatory or commemorative ads purchased by students and their families. As the Yearbook advertising order form suggested, student ads might include "[b]aby pictures, group photos taken in the setting of your choice, [or] pictures of meaningful people and/or places." A few advertisements were also sold to local businesses; most of these included congratulatory messages to the graduating class.

During the 1993-94 academic year, the Yearbook's unwritten policy was to publish advertisements from those local busi-

nesses which the students frequented or had some relationship with during their high school years. In keeping with this policy, students selling ads targeted those businesses that fit the Yearbook theme of fond memories. The Yearbook's policy was not to publish any political or advocacy advertising, including ads from candidates for student government.[1] The purposes of this policy were to ensure that the advertising section of the Yearbook was congruent with the rest of the publication and to prevent the Yearbook from becoming a bulletin board, in a way that would interfere with the commemorative purpose of the Yearbook.

The LHS Musket is a student-written and edited newspaper that is published four or five times a year. All editorial, operational, and staffing decisions are made by the student editors. During the 1993-94 academic year, Ivan Chan served as the Musket's editor-in-chief, Dong Shen was the business manager, and Samuel Kafrissen was the faculty advisor. Kafrissen is paid a stipend by LHS, and the Musket receives about $4000 a year in an appropriation from the schools committee. The Musket has no physical facilities at LHS, other than a mail box; all the layout is done at editors' homes. The Musket typically includes news articles about the high school, fea-

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[1] The record does not reveal whether political or advocacy advertising other than the ad giving rise to this litigation was ever submitted to the Yearbook. However, those affiliated with the Yearbook believe that it has never published a political or advocacy message or accepted an advertisement from a political or advocacy organization. Mr. Yeo offers no evidence to the contrary, and the record, which contains the advertising sections of several Yearbooks, bears out defendants' description of the types of congratulatory advertising printed.

tures, editorials, letters to the editor, sports coverage, and humor columns, all written, edited, and produced by students.

Not every issue of the Musket contains advertising. Those that do contain two or three small ads from businesses that cater to student tastes. During the 1990's, those advertisers have included a bookstore, a video store, a music store, a driving school, a deli, a hair salon, SAT prep courses, and, around prom time, a tuxedo rental store and a dress shop. For the 1993-94 school year, the Musket created an "Advertisement Form" for potential advertisers. The form stated that: "The award winning Lexington High School student newspaper provides area businesses and non-profit organizations the opportunity to place advertisements in the Musket." The form did not state that ads were subject to editorial approval, although it did note that, depending on the issue, ad size might have to be adjusted and ads might have to be edited, by the paper's staff, for length. The form also stated that "[p]ayment ... for an ad will occur only if and after we publish an ad." (Emphasis added).

***21** Pursuant to an unwritten policy, the Musket has never accepted advocacy or political advertising, including that from candidates for student government. The purpose of this policy was to prevent the Musket from becoming a bulletin board for warring political ideas. The students also rejected the idea of allowing cigarette ads in the paper for fear that such advertising would be read as an endorsement of smoking.

B. Yeo's Advertisements

In 1992, the Lexington School Committee adopted a policy making condoms available to students at LHS without parental permission. This measure was the subject of political controversy in Lexington, and Douglas Yeo, a town resident and parent, emerged as a leading opponent of condom distribution and other "safe sex" policies. Yeo headed a group called "Lexington Citizens for Responsible School Policy," which sponsored a non-binding town-wide referendum on the School Committee's condom policy.

The Musket ran both news articles and editorials on the policy and the referendum. Yeo thought these articles misrepresented his group's position. In January 1993, Yeo requested a meeting with LHS Principal David Wilson concerning his grievance. Wilson suggested that Yeo submit a letter to the editor correcting the alleged inaccuracies, but advised Yeo that any decisions regarding corrections would have to be made by the student editors. Yeo did not contact the student editors. In March 1993, the voters of Lexington approved the condom distribution policy.

Subsequently, in May 1993, Yeo founded the Lexington Parents Information Network ("LEXNET"). LEXNET's stated goal was to distribute information about public education to parents via newsletters and meetings.

1. The Yearbook Ad

On November 1, 1993, Yeo, as Chairman of LEXNET, submitted a full page ad to the 1994 LHS Yearbook. The ad copy read:

We know you can do it!
ABSTINENCE: The Healthy Choice
Sponsored by: Lexington Parents Information
Network(LEXNET)
Post Office Box 513, Lexington Massachusetts
02173.
The ad was a accompanied by a check for $200.00.

Mechem, the Yearbook advisor, acknowledged receipt of the check and placed the ad in a drawer without giving it a second thought. In keeping with Yearbook procedures, the LEXNET ad was "warehoused" in a drawer with other ads pending submission to the publisher for the printing of proofs. Natalie Berger, a senior and co-editor-in-chief, noticed the ad in the drawer and felt that the ad was "out of context" with the advertising section of the Yearbook. However, she decided to postpone a publication decision until she saw the ad in proof form, which was typically when critical editorial decisions were made.

In January 1994, a large number of proofs, including Yeo's ad, came back from the printer. All the student editors attended an editorial meeting at which they looked over the various ads and copy. After much discussion, the editors decided that Yeo's ad was a political advocacy statement that was out of context with the rest of the Yearbook and that had no place in

that publication. Although the students decided to reject the ad as drafted, they still wished to include a message from LEXNET if the ad could be rewritten to conform with the rest of the Yearbook. The students did not consult with Mechem or any other member of the faculty or administration prior to making this decision.

***22** The Yearbook editors asked Mechem to notify Yeo of their decision. The students also asked Mechem to convey their request that Yeo's ad be revised to express a congratulatory graduation message. On February 1, 1994, Mechem called Yeo, and told him that the students would like to have the ad rewritten. Yeo refused to revise the ad and threatened to sue the Yearbook unless his ad was published as submitted.

The student editors discussed the issue again, and decided to stand by their original decision to reject Yeo's ad. They asked Mechem to write to Yeo, returning his check. On February 4, Mechem wrote to Yeo:

> Because of the non-controversial nature of the advertising section of the yearbook, we have decided not to print the advertising you have submitted. Please accept my apologies for the inconvenience that our reviewing procedure may have caused.

A $200 check was enclosed. Mechem told Principal Wilson about Yeo's ad and the students' decision to reject it.

Yeo replied by fax on February 13, 1994, writing:

> Based on our understanding of the right of equal access and free speech, we do not accept your rejection of our ad and ask that you reconsider your decision to censor it. We will not be cashing your check at this time.

> Should you not reverse your decision, we will avail ourselves of every possible avenue open to us in order to protect our rights as advertisers.

2. The Musket Ad

On January 3, 1994, Yeo wrote to Dong Shen, a senior and the business manager of the Musket, requesting information about advertising procedures and rates. The letter was not on LEXNET stationary and did not identify Yeo as a member of that group. Receiving no reply, Yeo wrote to Shen again on January 20, requesting the information "as soon as possible," and copying Ivan Chan, the editor-in-chief, on the letter.

On January 25, Shen wrote to Yeo, providing the requested information and taking full personal responsibility for the delayed response. Shen concluded by noting, "Of course ads are still subject to the approval of the editorial board."

On, February 1, 1994, Yeo submitted an ad to the Musket. The text was identical to the Yearbook ad previously submitted, except that, above LEXNET's address, it contained the line: "For accurate information on abstinence, safer sex and condoms, contact:[LEXNET]."

The student editors of the Musket discussed the ad extensively. In mid- February, they met and decided that Yeo's ad constituted a political statement that they would not run as a matter of policy. On February 24, 1994, Shen wrote to Yeo:

> After careful consideration of your advertisement from LEXNET, the Musket came to the difficult decision of not printing it. In no way did we want to limit your right to

express your opinion, but we could not accept a political statement as an advertisement. Our own advertisement policy dictates so for good reasons. If we were to accept a politically aligned advertisement, we at the Musket would feel obligated to accept other political statements that might come our way. We do not wish to put ourselves in such position. Ultimately Ad space is not a public forum and for that reason the Musket reserves the right to select what Advertisements it chooses to print. If you have any question feel free to contact the Musket.

***23** The decision was made, and the reply written, by the student editors without consulting Kafrissen, the Musket faculty advisor, or requesting his, or any other adult's, approval. In fact, Kafrissen did not even know about the ad's submission until the time of the editorial meeting, and did not see the ad or the students' response until after the reply had been sent.

Sometime the next week, Principal Wilson called Kafrissen and informed him that Lexington's Town Counsel, Norman Cohen, had been contacted by Yeo's lawyer; the lawyer had threatened to sue the town and the school authorities if the ad was not run. Cohen thought that it would be best to avoid a lawsuit and requested that the students publish Yeo's ad. Kafrissen and Wilson agreed to look into the legal issues in greater depth and to discuss the matter with the students.

On March 1, 1994, the student editors of the Musket met with Kafrissen. Kafrissen informed them of Yeo's actions. Although a number of students at the March 1 meeting supported Yeo's pro-abstinence views, they were concerned that the Musket might turn into a bulletin board for advocacy on life-

style issues. Additionally, the students were uncomfortable with having to run an ad because someone had threatened to sue them if they did not. The editors once again decided to reject the ad. They asked Kafrissen to contact Yeo and to invite him to present his views in a "letter to the editor."

Kafrissen, on behalf of the Musket, wrote to Yeo that day. In the letter, Kafrissen suggested that Yeo write a letter to the editor:

> We have long considered the Letters to the Editor section of the Musket to be a public forum. Historically we have accepted and printed on these pages any and all "short and tasteful" letters that have come to us. We would welcome such a letter from your organization in which you would probably be able to explicate your position on abstinence more fully than you would be able to in an ad format. We have heard that you feel that school publications have prevented you from presenting your message to the student body. Therefore we suggest that you use the medium of a letter to get your message across in greater detail, and without charge.

The letter concluded by noting that, if Yeo were successful in forcing the Musket to print the ad, this would have the negative consequence of removing editorial control from the student staff.

Yeo declined the offer on March 7 in a letter to Kafrissen. In that letter, Yeo explained that his organization decided to sponsor the ads for two reasons:

> Firstly, we had a simple message we wanted to get out that would affirm abstinent students in the LHS community.... There is nothing controversial or political in our

> message. Secondly, I wanted to see if the Musket and Yearbook would re-act as I thought they would. They did. In spades.

Accordingly, Yeo declined to write a letter to the editor, which, he felt, could not make the point more concisely than an ad could. Yeo insisted that the ad be run as submitted, "as is our legal right," and concluded, "You don't have to agree with it. You don't even have to like it. You just have to print it. Touche."

C. The Administration's Response and the Students' Decisions

***24** On March 1, Yeo met with Principal Wilson to discuss the ads. Yeo believes that, at that meeting, Wilson assured him that the ads would be printed, and told him that the Town Attorney had advised publication.

Meanwhile, as the controversy heightened, the students and faculty alike were seeking advice from various sources. Mechem told Wilson that DowChung Chi, the Yearbook's co-editor-in-chief, had asked her: "If we don't print the ad, what law are we breaking?" In an attempt to answer his question, Mechem talked with Wilson, Kafrissen, and the Student Press Law Center in Washington, D.C. Several of the student editors of the Musket and the Yearbook sought advice from the Student Press Law Center and the Civil Liberties Union of Massachusetts, as well as from attorneys they knew personally. The students were told by these various sources that, under the federal Constitution and Massachusetts law, student editors had the right to decide what was printed in their publications.

On March 11, 1994, Yearbook editors-in-chief Berger and Chi, Musket editor-in-chief Chan, advisors Kafrissen and Mechem, Superintendent of School Jeffrey Young and Principal Wilson attended a fact-finding session in Young's office. Young asked questions to determine what the students' reasoning was, and to determine that they had engaged in a thoughtful process prior to the meeting.

The administrators and faculty were impressed with the way the students outlined the issues. Young concluded by stating that he would like to do further research and to obtain legal advice.

In mid-March, Musket editor-in-chief Chan was approached by a group of students who were offended by Yeo's efforts and who wished to place a "counter ad" in the Musket. The proposed ad looked exactly like Yeo's ad except that, in place of "Abstinence:. The Healthy Choice," it read "Safe Sex: The Healthy Choice." Chan decided to reject the counter-ad, and informed the staff that it would not be published.

On March 13, Chan called a meeting of the entire Musket staff; Kafrissen was not invited and did not attend. At that meeting, Chan briefed the students on the events surrounding the submission of Yeo's ad. The student staff unanimously opposed publication of Yeo's ad.

On March 18, a second meeting was held in Superintendent Young's office. In addition to the prior participants, Lexington School Committee members attended. (LHS Assistant Principal Lawrence Robinson attended in Principal Wilson's stead). The Musket and Yearbook editors reiterated their re-

fusal to run Yeo's ads. The school officials and School Committee members warned the students of the possible consequences of their decision, including litigation, and described the potentially unpleasant media exposure the students could expect. Although the students felt that the school officials wanted them to print the ads, the officials maintained that it was the students' decision to make.

***25** Following the March 18th meeting, Chan held several further discussions with individuals and groups from the Musket 's staff. Finally, with the staff s support, he conclusively decided not to run Yeo's ad as a matter of policy.

As for the Yearbook, Chi and Berger asked Mechem to invite Yeo, on the students' behalf, to a meeting at which alternatives could be discussed. Yeo wrote to Mechem on March 28, informing her that, on the advice of counsel, he would not be able to meet with the student editors, and requesting that all further inquiries be addressed to his lawyer at the Rutherford Institute in Virginia.

Berger then called a meeting of all the Yearbook section editors. Mechem attended the beginning of the meeting and urged the students to consider the school officials' advice. Mechem then left the meeting. The students discussed the issues raised at the March 18 meeting. The students reaffirmed their decision to reject Yeo's ad. Chi and Berger then drafted a memo to Superintendent Young and the School Committee. It concluded:

> After much discussion and deliberation, the reasons for our decision are as follows. The nature of the advertisement, which promotes a style of life, regardless of the

> message, does not coincide with that of the rest of the advertisement section of the yearbook. The inclusion of this type of advertisement would also establish an unsuitable precedent for the future of the yearbook.

This litigation followed. During the 1994-95 school year, the new student editors of the Yearbook decided not to accept any advertisements other than personal notes from parents and students. Yeo resubmitted his ad in September 1994, but it was rejected under the new policy. The 1994-95 Musket staff drafted explicit "Advertisement Policies and Procedures," to be distributed with advertisement forms, which states the type of advertisements, including those from "political organizations, referendum issues, advocacy groups, [and] public service organizations," that the Musket will not print.

II. State Action

The essential state action inquiry is whether the government has been sufficiently involved in the challenged actions that it can be deemed responsible for the plaintiff's claimed injury. If there is no state action, then the court may not impose constitutional obligations on (and thus restrict the freedom of) private actors.

The state action question requires an independent evaluation by a federal court of whether there is a sufficient nexus between the decision not to accept Mr. Yeo's advertisement and the state. We are required to make this independent assessment even in the face of a state statute, Mass. Gen. Laws ch. 71, § 82, which appears to have been intended, in part, to ex-

press Massachusetts' policy judgment that actions by student editors are not state action.[2] The state statute cannot be determinative of the outcome of the federal constitutional question. Lebron v. National R. R. Passenger Corp., 513 U.S. 374 ---, 115 S.Ct. 961, 971, 130 L.Ed.2d 902 (1995) (statutory declaration that Amtrak is not government entity not dispositive of governmental action question where constitutional rights are involved).

***26** Nor can the state action question be resolved against Yeo on the grounds that the Constitution prohibits the state actors, the school administrators, from acting to interfere with the student editors. Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), makes it difficult to reach such a conclusion. This is a situation in which the government--the school officials--has chosen not to act and not one in which the Constitution either requires or prohibits action by those school officials. The state action analysis is thus placed squarely in a very complex and changing area of law.

The state action issue implicates a myriad of players, only some of whom are defendants. Mr. Yeo sued only those indi-

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[2] The statute provides, in pertinent part:
The right of students to freedom of expression in the public schools shall not be abridged, provided that such right shall not cause any disruption or disorder within the school.... No expression made by students in the exercise of such rights shall be deemed to be an expression of school policy and no school officials shall be held responsible in any civil or criminal action for any expression made or published by the students.

Mass. Gen. Laws ch. 71, § 82; see also Pyle v. School Comm., 423 Mass. 283; 667 N.B.2d 869 (1996).

viduals who are public school administrators, teachers, or members of the Lexington School Committee. They are concededly state actors. He did not sue the student editors. But the "action" of which Mr. Yeo complains was an action taken by the students. The "action" he assails was the decision not to publish his advertisement. That decision was made by the students. The defendant state actors only decided not to interfere with the students' decision.

Thus, Yeo's claim can only succeed if the decision by the school administrators not to interfere with the students' decision is state action, or if all the facts, including the public school setting, taken together in context, suffice to produce state action.

The leading Supreme Court decisions concerning high schools and students are all meaningfully different from this case, and thus provide little guidance on the state action question. Each of those cases involved a claim by students that the actions of school administrators violated their constitutional rights. State action was not at issue because the relevant actions were admittedly taken by public school officials. See, e.g., Hazelwood, 484 U.S. at 262, 108 S.Ct. at 565 (students contend officials violated First Amendment by deleting articles from student newspaper); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Fd.2d 549 (1986)(civil rights claim by student disciplined by officials for language used in school assembly); Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969)(student claim that principals' regulation against armbands violated First Amendment); see also Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995)(Student Fourth

Amendment claim against school district). Here, by contrast, a party from outside the school is asserting claims that either the actions of students, as influenced and facilitated by school officials, or the inaction of school officials violated his constitutional rights.

It is difficult to shoehorn the facts of this case into the fact patterns of the modern state action cases. Is this case like Rendell-Baker v. Kohn, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982), where the actions of a private school, almost entirely funded by the state and closely regulated by public authorities, were found not to be state action? Arguably not, because this case involves a public school. Is it more like Edmonson v. Leesville Concrete Company, Inc., 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), where a private litigant's race-based exercise of peremptory challenges was found to be state action? Arguably not, because the alleged deprivation here does not implicate a traditional function of the government. Is it more like NCAA v. Tarkanian, 488 U.S. 179, 109 S.Ct. 454, 102 L.Ed.2d 469 (1988), where an unincorporated association of public and private colleges was found not to be a state actor even though the association's actions led a public college to take disciplinary action against a basketball coach? Arguably not, because in this case the state actors, the adults, have a supervisory relationship to the private group, the students, and are thus somewhat the inverse of the NCAA and the public college.

***27** Nonetheless, some factors emerge from the precedents as a guide to decision. First, the fact that the newspaper editors are public school students does not, in itself, make them state actors. Persons do not become state actors because they are clients of government services, whether they are students, hospital patients, or prison inmates.

This is also not a situation where the state has delegated traditional governmental authority to a private actor. See Edmonson, 500 U.S. at 621, 111 S.Ct. at 2083; West v. Atkins, 487 U.S. 42, 55-57, 108 S.Ct. 2250, 2258-60, 101 L.Ed.2d 40 (1988). The running of a newspaper or a yearbook is not a traditional governmental function. Nor is the function one that is traditionally the exclusive prerogative of the state. See Flagg Bros. v. Brooks, 436 U.S. 149, 157, 98 S.Ct. 1729, 1733-34, 56 L.Ed.2d 185 (1978). Private schools commonly have student newspapers, and public schools not uncommonly have independent student newspapers.

Another factor is the nexus between state regulation and financial support and the challenged action. See Blum v. Yaretsky, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2785-86, 73 L.Ed.2d 534 (1982); Rendell-Baker, 457 U.S. at 838-841, 102 S.Ct. at 2769-71. It is established that a private institution's receipt of virtually all of its funding from the state does not render that institution's decisions state action. Id. at 840, 102 S.Ct. at 2770-71. Here, the Yearbook receives no money from the school system other than the indirect assistance it gets from the small stipend received by its faculty advisor. The Musket receives greater financial assistance. Much of its operating costs as well as its advisor's stipend are paid by the school system. However, this analysis does not resolve the state action question. Rendell-Baker focussed on the interplay between the action at issue and the state funding and regulation. Id. There was little interplay between the decision here and the state. That the principal kept the checkbook for the school newspaper had nothing to do with the students' decisions not to run the ads. Nor did the fact that the faculty advisors, at the students' request, corresponded with Mr. Yeo. The state did

not exercise coercive power which compelled the students' decision, nor can the state actors fairly be said to have overtly or covertly provided significant encouragement. See Blum, 457 U.S. at 1004, 102 S.Ct. at 2785-86. Here, as in Rendell-Baker, "the decisions [at issue] were not compelled or even influenced by any state regulation." Rendell-Baker, 457 at 841, 102 S.Ct. at 2771.

This is also not an instance in which the government knowingly accepts the benefits derived from unconstitutional behavior. See, e.g., Burton v. Wilmington Parking Auth., 365 U.S. 715, 724, 81 S.Ct. 856, 861, 6 L.Ed.2d 45 (1961). That type of symbiotic relationship has been found to create state action where the government tacitly endorses and becomes entangled with private discrimination. Id. at 724, 81 S.Ct. at 861. It is difficult, however, to discern what mutual benefits might arise from the students' decision not to run Yeo's ads.

***28** Here, the government has chosen not to act. The school officials, supported by the state statute, made a policy decision to allow the students to make the final publication decision. "The First Amendment does not reach acts of private parties in every instance where the [government] has merely permitted or failed to prohibit such acts." CBS v. Democratic Nat'l Comm., 412 U.S. 94, 119, 93 S.Ct. 2080, 2095, 36 L.Ed.2d 772 (1973). In CBS, a plurality of the Supreme Court found that the decisions of broadcasters not to accept any editorial advertising were not government action for purposes of the First Amendment, even though the government both licensed and heavily regulated the broadcasters. Id. at 116-19, 93 S.Ct. at 2093-95.

The ultimate question is still whether the persons who caused the alleged deprivation "could be described in all fairness as ... state actor[s]." Edmonson, 500 U.S. at. 620, 111 S.Ct. at 2083. Admittedly, there is more than a little interplay between the student publications and the government. Yet, in light of Rendell-Baker, more than even extensive interplay is required to show state action where there is no nexus between the interplay and the challenged decision. See Rendell-Baker, 457 U.S. at 838-41, 102 S.Ct. at 2769-71.

Perhaps that something more is supplied by the context. The newspaper is the newspaper of the public high school; its name is the "Lexington High School Musket" and it identifies itself with the high school in its communications and interactions with other students and the community. It does receive some financial support from the school and the faculty advisors may have some subtle influence.[3] It exists in the form it

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[3] The majority contends that, viewing the record in the light most favorable to Yeo, we must infer that the student editors did not in fact make their decision independently, but were actually guided to reach that decision by their faculty advisors. While we must, of course, draw all reasonable inferences in favor of the non-moving party, speculative allegations are insufficient to defeat summary judgment. See, e.g, LaRou v. Ridlon, 98 F.3d 659, 661 (1st Cir.1997). Here, after discovery, there is no evidence, and Yeo points to none, that the decision not to print the ads was made by anyone other than the student editors. To the contrary, all the testimony is consistent: The students themselves decided.

Yeo invites us to infer that the advisors played a greater role than they admit, and calls our attention to the fact that the advisors authored some of the correspondence, using the term "we," and to the fact that, on one occasion, Kafrissen threatened to resign if the students did not take his advice. It is true that Kafrissen and Mechem used the word "we" in letters to Yeo. However, the letter from Kafrissen was written after Dong Shen had already communicated the students' rejection of the ad to Yeo. As for Mechem's correspondence, Mechem and the Yearbook editor both stated

does because the school authorities permit it to do so. While not part of the for-credit educational curriculum, work on the Musket does have explicit educational value and provides an attractive credential for students. The student editors perform some of their functions on school grounds, perhaps even during school hours. All of these factors point toward a finding of state action. It is a close question whether the injury caused here "is aggravated in a unique way by the incidents of government authority." Edmonson, 500 U.S. at 622, 111 S.Ct. at 2083 (citation omitted).[4] The majority's conclusion that there is state action is both reasoned and reasonable.

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unequivocally that the decision was made by the students prior to consultation with Mechem, and that Mechem wrote to Yeo at the student editors' request. As to Kafrissen's threat to resign, the incident only serves to illustrate that Kafrissen did not believe he had the authority to order the students around. His actual description of the incident is as follows:

I have never ordered (nor do I have the authority to order) the student editors not to run an editorial, news or feature article or any advertisement. I have used persuasion to address matters that seemed over-the-line. On one occasion, for example, when I disagreed strongly with a proposed student editorial, which, in my opinion, took an extremely irresponsible position, I was prepared to resign if my advice to withdraw the editorial was not accepted. The editors engaged in an extensive debate and consulted with their parents before finally agreeing to withdraw the editorial.

There is nothing in the record even to suggest that Kafrissen engaged in such persuasive techniques with regard to the Yeo ad; rather, 'the uncontradicted evidence is that Kafrissen took prophylactic measures to ensure that the students felt free to make their own decision.

[4] Cf. Marjorie Heins, Viewpoint Discrimination, 24 Hastings Const. L.Q. 99, 159 (1996)("Public education presents a paradoxical situation: it is government speech for some purposes, yet also a quintessential forum for intellectual growth [and] exploration....")

Nonetheless, I would reach a different conclusion. The state action question should be resolved in the specific context of the constitutional deprivation being claimed.[5] The claim here is one under the First Amendment, objecting to the exercise of editorial judgment, and the decision being challenged is one made by the students alone.[6] It certainly cannot be said that, but for governmental interference, Mr. Yeo would have been free to run his advertisement. Whether someone is a state actor may shift depending on the context and the question asked.[7] A public defender is not a state actor in her representation of a

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[5] The "search for state action ... ends by identifying the precise substantive constitutional issue to be addressed." Tribe, American Constitutional Law § 18-6, at 1715 (2d ed. 1988).

[6] Although decisions involving public universities' student run publications are not directly analogous, given the state's potentially greater role in regulating the behavior of younger, high school students, they provide some assistance. In Sinn v. The Daily Nebraskan, 829 F.2d 662, 665 (8th Cir.1987), the court held that there was no state action in the refusal to print an ad where the student paper "maintains its editorial freedom from the state." See Leeds v. Meltz, 85 F.3d 51 (2d Cir.1996)(no state action where student editors of law school journal rejected ad), Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1075 (5th Cir.1976)(similar); see also Avins v. Rutgers, 385 F.2d 151, 153-54 (3d Cir.1967)(state-supported law review's rejection of article did not violate First Amendment because editorial discretion is necessary component of publishing a journal). But see Lee v. Board of Regents, 441 F.2d 1257 (7th Cir.1971) (state action conceded where student newspaper was a "state facility").

[7] See Nahmod, Civil Rights and Civil Liberties: The Law of Section 1983 § 2.04, at 63 (3d ed. 1991)("[S]tate action is not a unitary concept, but varies depending on the constitutional violation'asserted."). But see Lamb v. Rantoul, 561 F.2d 409, 411 (1st Cir.1977) (expressing, in dicta, "qualms" about treating entities as private actors in some contexts and state actors in others, depending on the "special offensiveness" of the constitutional violation alleged).

criminal defendant, even. though she may be one in the performance of other duties, such as hiring or firing decisions. Polk County v. Dodson, 454 U.S. 312, 324-25, 102 S.Ct. 445, 453-54, 70 L.Ed.2d 509 (1981). While acknowledging that the public defender is a state employee, Polk County considered it important that the public defender's relationship to the state was necessarily independent, and even adversarial. Id. at 321-22, 102 S.Ct. at 451-52. So too here.[8]

***29** Here, the students' relationship to the public school officials in the exercise of their editorial judgment is independent, and at times, adversarial.[9] This is established by the actions of both the students and the school officials. This independent relationship accords with the allocations of power established by the state statute. See Mass. Gen. Laws ch. 71, § 82. The school officials gained nothing by the students' decision, and the officials might have made a different decision. Because

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[8] Similarly, in Edmonson, not all of the litigation decisions of the defendant private company were deemed to be state action; only the race-based exercise of preemptory challenges were. See Edmonson, 500 U.S. at 621-22, 111 S.Ct. at 2083-84. This was, in part, because "[r]acial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality. " Id. at 628, 111 S.Ct. at 2087. Where such interests are at stake, the acquiescence of a government actor in the discriminatory actions of a private party may implicate the Constitution. For example, if this were a claim brought by a student who had been excluded from election to the editorial board on account of her race, and the school officials declined to intervene, the analysis would focus on a different decision and most likely would reach a different result.

[9] The situation is thus different than a hypothetical case, perhaps arising under the Establishment Clause, where an "independent" student organization actually has the covert or overt support of school officials for its decisions.

the record establishes the independent editorial judgment of the student editors of both publications, I would resolve the difficult question of state action against Yeo.

III. First Amendment Analysis

Resolution of the state action question does not decide whether the First Amendment constraints on the student editors which would require them to accept Yeo's advertisement. Lebron, 513 U.S. ----, at 115 S.Ct. at 974- 75 (holding that Amtrak is "part of the Government for purposes of the First Amendment,' and remanding for determination of whether refusal to display advertisement violated that Amendment); Lebron v. Amtrak, 69 F.3d 650, 656 (2d Cir.1995) (holding on remand that Penn Station billboard was not public forum).

There are First Amendment interests on both sides of this case. There is Yeo's interest in running an advertisement expressing legitimate pro-abstinence sentiments. There is the students' interest in not being forced to turn their advertising pages into an advocacy battleground. There are also the free speech and free press interests of the student editors in not having the government, through the courts, make editorial judgments for them.

A. Public Forum Doctrine

The majority opinion concludes that the acceptance of other advertising by the two publications renders each of them a public forum. Proper application of the public forum doctrine leads, I believe, to a different result. Forum analysis was developed initially as an effort to address free speech issues in

the context of the many different types of real property owned by the government. See Student Gov't Ass'n v. Board of Trustees, 868 F.2d 473, 477 (1st Cir.1989). The doctrine was later used to analyze rights of access to other types of government-sponsored channels of communication, such as an internal school mail system. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-49, 103 S.Ct. 948, 954-57, 74 L.Ed.2d 794 (1983).

Under public forum doctrine, neither of these publications is a public forum, nor even a limited public forum. The traditional public forum has been a park or a street or a sidewalk: places that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. CIO, 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939) (Roberts, J., concurring). In contrast, a high school yearbook is simply a compilation of photographs, meant to capture the personalities and events of the high school years, a visual memorialization. Its advertising is designed to defray the costs of publishing the yearbook and to express good wishes to the graduates. The advertising in the LHS Yearbook, which until the late 1980's ran no ads at all, has consisted of messages of congratulations to the graduates from parents and local businesses. High school yearbooks are not usually vehicles for the expression of views, or for robust debate about societal issues, and they never have been. There can be no serious argument that this yearbook is a public forum.

***30** The harder question concerns the newspaper. Certainly a private newspaper publisher is not constrained by the govern-

ment to accept and publish all points of views or any point of view. Indeed, the First Amendment prohibits exactly that governmental interference, even in the name of equal access. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 251-56, 94 S.Ct. 2831, 2836-39, 41 L.Ed.2d 730 (1974) (state statute granting a political candidate a right to equal space in newspapers to reply to criticism violates First Amendment). That a newspaper's essential purpose is to be a channel of communication does not make it a public forum.

Even if the government actually controlled the publication, as it clearly does not here, that does not make the paper a public forum. In Hazelwood, the Supreme Court addressed the claim of high school newspaper staff members that school officials violated their First Amendment rights by deleting certain articles from the newspaper. 484 U.S. at 262, 108 S.Ct. at 565. The Supreme Court rejected the students' claim, holding that the school newspaper was not a public forum. Id. at 267-70, 108 S.Ct. at 567-70. The logic of Hazelwood requires that the public forum claim be rejected here. The Court held that school facilities, including newspapers, may be deemed to be a public forum "only if school authorities have by policy or by practice opened those facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations." Id. at 267, 108 S.Ct. at 568 (internal quotation marks and citations omitted). On this record, there can be no claim that the advertising pages or any other part of the Musket were opened "for indiscriminate use by the general public" or "by some segment of the public." (Even other stu-

dent organizations could not make "indiscriminate" use of the paper.)[10]

" 'The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.' " Hazelwood, 484 U.S. at 267, 108 S.Ct. at 568 (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802, 105 S.Ct. 3439, 3449, 87 L.Ed.2d 567 (1985)). The majority's conclusion that the student newspaper is a public forum violates this rule.[11]

The majority also suggests that the Musket had opened itself to the advertising public, see Cornelius, 473 U.S. at 802, 105 S.Ct. at 3448-49, because the newspaper ran some advertisements. That is not enough, as the Supreme Court made clear in both Cornelius, 473 U.S. at 804-05, 105 S.Ct. at 3450-51, and Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974). In Lehman, the Shaker Heights Rapid Transit System displayed advertising in its rapid transit cars but had a policy and practice of refusing all political and public issue advertising. Id. at 300-01, 94 S.Ct. at 2715-16. The Court held that "[n]o First Amendment forum is here to be found." Id. at 304, 94 S.Ct. at 2718. A government-owned and operated rapid transit system which carries messages seen

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[10] Under the majority's analysis, even the school administration could not decide to reject Mr. Yeo's advocacy advertising. This clearly contravenes the discipline of Hazelwood.

[11] While there is much to be said for First Amendment due process concerns, this case does not raise such issues. See Monaghan, First Amendment "Due Process," 83 Harv. L.Rev. 518, 519 (1970).

by thousands of riders daily seems more likely to be a public forum than the limited circulation student newspaper here. If the sale of commercial advertising was insufficient to create a public forum in Lehman, it is surely insufficient here.[12]

*31 Lehman aside, there is no public forum here for an even more fundamental reason, a reason articulated strongly in Perry, Cornelius and Hazelwood. Significantly, there can be no finding of a public forum absent an intent by the government to create such a forum. E.g., Cornelius, 473 U.S. at 802, 105 S.Ct. at 3448-49. The record here demonstrates that the students' very strong intent was to avoid creating a public forum, or a "bulletin board" as they termed it, on the Musket 's advertising pages. The newspaper advertisements, not surprisingly, were from businesses catering to teenage tastes: video, book, and record stores, test prep services, and a deli. The Musket (and the Yearbook) had never in the past accepted political or issue oriented advertising. When presented with a request to run such an advertisement, the student editors declined on the ground that it would be inconsistent with their policy and practice. Despite pressure from the high school principal, the school system superintendent, and School Committee members to accept this advertisement (rather than face litigation), the student editors stood by their original re-

[12] The majority suggests that Lehman's analysis has been superseded by subsequent Supreme Court opinions. However the Court has frequently reaffirmed Lehman. See, e.g. International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678, 112 S.Ct. 2701, 2705, 120 L.Ed.2d 541 (1992) (noting that Court has "upheld a ban on political advertisements in city-operated transit vehicles"); Cornelius, 473 U.S. at 806, 105 S.Ct. at 3451 (A "speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed in the purpose of the forum ...") (citing Lehman).

jection of the advertisement. During the next academic year, the student editors of the Musket adopted a formal written policy prohibiting the acceptance of all political and advocacy advertising. The Yearbook discontinued accepting commercial advertising altogether. There was no intent to create a limited public forum, and no intent can be inferred from the lack of a pre-existing written policy.

Different standards have been articulated and applied in recent forum analysis cases,[13] ranging from the fairly deferential standard for measuring governmental intent used in cases such as International Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992) (vestibules of public airports are not public fora), and United States v. Kokinda, 497 U.S. 720, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) (sidewalk outside post office not a public forum), to a more searching approach which looks at actual practice, suggested in cases such as Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993). That variance in the articulated standards would not affect the outcome here. Neither the newspaper's actual practice nor the student editors' expressions of their intent would support a finding that a public forum had been created.

Even if these publications were limited public forums, there is still no violation of the principle of equal access. There is no viewpoint discrimination here. The decision taken was to ex-

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[13] This court has cautioned that there is some inconsistency in the standards used by the Supreme Court in determining whether a public forum has been created. See AIDS Action Comm. v. Massachusetts Bay Transp. Auth., 42 F.3d 1, 9-10 (1994).

clude a certain subject matter, advocacy advertising, regardless of the viewpoint expressed by the advertisement. This case does not present any real danger that the government has selectively excluded certain expression from property it has otherwise deliberately opened to expressive activity. If the newspaper had a history of accepting advocacy advertisements, one could say it had decided advocacy advertisements were consistent with the mission of the paper. If the newspaper then singled out a particular advertisement and refused to publish it, one would be warranted in asking questions about whether its motive was illicit and whether there was viewpoint discrimination.[14] But this newspaper never accepted such advertisements. In fact, when offered a "counter-ad" to Yeo's message, the student editor declined to print that as well. Yeo offers no evidence of a contrary practice.[15]

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[14] That the students had expressed a viewpoint on condom distribution in the editorial pages of the newspaper does not mean that equal access requires alternative viewpoints in the advertising section. Part of the educational value of a student newspaper may be developing and articulating an editorial stance. The majority recognizes that the newspaper is not a unitary forum but then misapplies this principle. This case does not concern access to the editorial page of the newspaper. If it did, the short answer to Yeo would be that the students suggested a forum for Yeo's alternative viewpoint--they offered him space in the "Letters to the Editor" section. Cf. Avins, 385 F.2d at 153 ("The right to freedom of speech does not open every avenue to one who desires to use a particular outlet for expression").

[15] This court's decision in AIDS Action Committee, 42 F.3d at 9-12, supports the conclusion that there is no viewpoint discrimination here. Without deciding the public forum issue, this court held that a public transit authority created the appearance of viewpoint discrimination when it ran sexually explicit movie advertisements that used double entendre while rejecting, on those very grounds, condom advertisements by an AIDS education group. Here there is no record of the newspaper accepting adver-

***32** To find a constitutional violation on these facts itself creates a First Amendment problem. The majority asserts that the students rejected the advertisements because they were "controversial." While it is true that Mechem and Kafrissen, the faculty advisors, referred to "controversy" in their communications with Yeo, the Musket's student editors, from the very beginning, before consulting with-adults, phrased their rejection of the ad in terms of reluctance to establish a precedent of accepting any political or advocacy advertising. Similarly, the affidavit and written policy statement of the Yearbook editor, Natalie Berger, express a clear desire to keep all the sections of the Yearbook in context with the commemorative theme. These motivations are not fairly described as a desire to suppress "controversial" speech. Rather, the students were attempting to avoid the creation of a forum for certain categories of expression.

The term "controversial' was used by the faculty advisors to describe the category of political and advocacy speech that the publications did not want. That is no different than what the transit system in Lehman did. Indeed, in Lehman, a plurality of the Supreme Court used the very language the majority objects to here: The "decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation." Lehman, 418 U.S. at 304, 94 S.Ct. at 2718. Furthermore, the Supreme Court has recognized the paradoxical aspects of requiring the media to carry certain advertisements

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tisements of the type which Mr. Yeo offered, unlike the transit authority's record of running sexually explicit advertisements.

in the name of free expression: Although broadcasters are subject to extensive governmental regulation, to require them to accept editorial advertisements "in the name of the First Amendment would be a contradiction." CBS, 412 U.S. at 120-21, 93 S.Ct. at 2095.

Four Justices of the Supreme Court recently suggested that it is an open question whether "the Government's viewpoint neutral decision to limit a public forum" is subject to the same scrutiny as a "selective exclusion from a pre-existing public forum." Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, --- U.S. ----, ---- 116 S.Ct. 2374, 2385, 135 L.Ed.2d 888 (1996)(plurality opinion). At most this case involves a viewpoint neutral decision to limit what plaintiff argues is a public forum; it is quite clear that there was no preexisting public forum for political or advocacy advertisements from which Yeo was selectively excluded.[16] And, as Justice Breyer has noted:

> Our cases have not yet determined ... that the Government's decision to dedicate a public forum to one type of content or another is necessarily subject to the highest level of scrutiny. Must a local government, for example, show a compelling state interest if it builds a band shell in the park and dedicates it solely to classical music (but not to jazz)?

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[16] Moreover, even assuming that the advertising sections of the Yearbook and the Musket were once public fora, they are now closed. This is certainly permissible. How else can the forum managers gain the benefits of experience, including the experience that the costs of expression may, in fact, undermine the basic functions of the forum? The government "is not required to indefinitely retain the open character of the facility. Perry, 460 U.S. at 45-46, 103 S. Ct. at 955.

*33 Denver Area, --- U.S. at ----, 116 S.Ct. at 2389.

B. An Unwritten Policy

At the heart of the majority opinion is its determination that, by not promulgating written guidelines prohibiting political. and advocacy advertising, the students had unbridled discretion to reject any ad. Such discretion, the majority argues, is constitutionally impermissible, because it facilitates viewpoint discrimination. With deference, that argument cannot hold on either a factual or a legal level. The absence of written regulations adds nothing to the analysis save for this unfortunate consequence: under the majority view, the students' decision would have been acceptable if they only had had the forethought to promulgate written policies stating that no advocacy advertising would be accepted. That is not constitutional doctrine. Increasing bureaucratization frequently diminishes, not enhances, our freedoms.

On these facts, putting aside innuendo and speculation, no viewpoint discrimination can be discerned. Both the students and advisors testified that the students had a policy of excluding advocacy advertising. The record shows that the Musket also rejected a "counter-ad" espousing the procondom distribution viewpoint. The majority's discretion argument requires the court to draw the inference that the ad was not in fact rejected for the reasons that the students stated it was, and instead to infer that the decision to reject Yeo's ad was actually

ad hoc viewpoint discrimination.[17] But there is no evidentiary basis for such an inference; the record makes it abundantly clear that the Yearbook and Musket's practices were completely consistent with the articulated policy. The lack of pre-existing formally established policies must be understood in context. This is a high school newspaper at issue, not the personnel department of IBM.

Moreover, as a matter of law, the absence of a written policy neither constitutes a constitutional violation in itself nor mandates the inference that a particular forum is public. While the absence of any guiding principles may raise the specter of unfettered discretion, a policy does not have to be written to be real. As the Second Circuit has stated, "[t]he fact that a policy is not committed to writing does not of itself constitute a First Amendment violation." Lebron, 69 F.3d at 658. A policy limiting the use of a forum may be expressed through "well-established practice." City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 770, 108 S.Ct. 2138, 2151, 100

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[17] As discussed above, the use of the word "controversial" does not turn the students' decision into viewpoint discrimination. The majority posits that the statements that the advertisements were rejected pursuant to policies and that they were rejected because they were controversial are somehow inconsistent. In his letter to Yeo, Dong Shen, the student Business Manager of the Musket, clearly rejects , the idea of publishing "political statements" of any type. Similarly, the Yearbook editors were concerned about the overall tone and coherence of their publication. The students therefore decided to reject the subject matter category of political and advocacy advertising, in part because that type of advertising may cause controversy. This is not viewpoint discrimination. Although the First Amendment places a high value on the controversy that may arise in the marketplace of ideas, it does not follow that any and every forum that is even marginally connected to the government is an appropriate place for that controversy.

L.Ed.2d 771 (1988). Nor does the lack of written guidelines require the inference that the forum in question is, by default, open to all users and therefore public. In Hazelwood, the fact that the principal had not promulgated written guidelines as to how he would exercise his right of review did not permit the inference that he had opened the newspaper to whatever the students wished to print. Hazelwood, 484 U.S. at 268-69, 108 S.Ct. at 568- 69. Similarly, in Lebron, Amtrak's failure to maintain a written policy prohibiting political advertising did not render its billboard space a public forum. 69 F.3d at 658. Amtrak had a consistent practice that was supported by the record and had never opened the billboard for anything other than purely commercial advertising. Id.

C. Beyond Forum Analysis: Newspapers and the First Amendment

***34** Other important First Amendment values weigh against court intervention. It is passingly strange to even think of a student newspaper as a public forum.[18] Cf. Denver Area, --- U.S. at ----, 116 S.Ct. at 2388 (questioning application of public. forum. doctrine to cable television programming); Kokinda, 497 U.S. at 741, 110 S.Ct. at 3127, (Brennan, J., dissenting) (questioning whether public forum analysis serves to obfuscate rather than clarify issues and noting the large body of commentary criticizing the use of the doctrine); Nat'l Ass'n. of Soc. Workers v. Harwood, 69 F.3d 622, 644 (1st Cir.1995) (Lynch, J., dissenting). Public forum doctrine grew

[18] Indeed, the Supreme Court has had difficulty applying the public forum concept to public school classrooms. See Widmar v. Vincent, 454 U.S. 263, 267-70, 102 S.Ct. 269, 273-75, 70 L.Ed.2d 440 (1981).

out of analogies to public parks and streets, analogies necessitated by the fact that the government owns, and controls access to, so many different types of property. There is no need in First Amendment law to create a doctrine by analogy to apply to newspapers. The First Amendment itself grew out of the conflict between newspaper publishers and the government over control of the content of newspapers. See, e.g., Glendon, The Trial of John Peter Zenger, 68 N.Y. St. B.J. 48, 52 (1996). There is remarkably rich First Amendment doctrine in the area of regulation of newspapers, and it all counsels against court intervention here.

Of the various forms of communication media. available today, it is newspapers which receive the most protection from interference by the government. See CBS, 412 U.S. at 117-18, 93 S.Ct. at 2093-94; Red Lion Broadcasting Co. v. FCC., 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969). "The first amendment guarantee of freedom from government intrusion reigns most confidently in the realm of the print media, since newspapers and pamphlets were the most significant modes of mass communication in the world of the Framers." Tribe, supra, § 12-25, at 1003. The possibility that court orders may constitute unconstitutional interference with the publication of newspapers has long been recognized, whether that interference is in the form of damages actions, New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), or injunctive relief, New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971)("Pentagon Papers" case). Special care should be taken when a newspaper is essentially the defendant.

The use of the public forum doctrine is odd in another way. The public forum classification approach may work best for a "piece of public property that is 'suitable for discourse' in its physical character...." International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 711, 112 S.Ct. 2711, 2724-25, 120 L.Ed.2d 541 (1992)(Souter, J., concurring in part and dissenting in part). Such a rationale does not apply to newspapers. Parks, streets, and sidewalks are open to the public, and the government has to impose restrictions if it wishes to limit access. A newspaper is very different. By definition, there is no free access to what is carried in a newspaper and choices are made as to what the paper will print. Editorial judgment is always exercised. That editorial judgment is itself a protected aspect of speech. It is protected even in cable broadcasting, where the government licenses the use of scarce airwaves. Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). A decision by a court could itself violate the First Amendment by interfering with a private party's freedom to speak as an editor. Denver Area, --- U.S. at ----, 116 S.Ct. at 2383.

***35** The free speech concerns which animate the public forum doctrine are simply not present here. Student newspapers are not a traditional way for the public to express their views. Parks and sidewalks are. The government may have exclusive control over parks and sidewalks, and may wield the power to completely exclude disfavored speech. Strict scrutiny may be necessary to ensure that some viewpoints are heard at all. The government enjoys no similar monopoly over newspapers, even student newspapers.

While parks and sidewalks are open to rich and poor alike, and may be one of the few avenues of expression available to disadvantaged or disfavored groups, newspaper advertising pages are not a level playing field: those with the wealth to advertise do so, those without are precluded. The students would be warranted in not wanting to create a forum where such disparities may give advantage to one side in a debate.

That this is a student newspaper raises its own set of concerns. See, e.g., Hazelwood, 484 U.S. at 266-67, 108 S.Ct. at 567-68; Tinker, 393 U.S. at 506, 89 S.Ct. at 736; see also Vernonia, 515 U.S. at ----, 115 S.Ct. at 2391. This case involves completely different arguments of interests than do disputes between students and a school administration over control of the students' speech. Although the school administration, under the threat of a lawsuit and of spending scarce educational funds on legal defense costs, apparently would have made the judgment call about publishing the advertisement differently, the school officials have deferred to the judgment of the student editors. They have been encouraged in this result by the public policy of Massachusetts as expressed in Mass. Gen. Laws ch. 71, § 82. Thus, the school officials have determined that requiring acceptance of Yeo's advertisement would not have sufficient educational value to outweigh the educational value of honoring the students' editorial freedom.

This litigation was initiated by someone outside the immediate school community of students and their teachers. But schools as schools do not exist to provide a forum for the public expression of disparate views and there are strong interests which more than offset Yeo's expressive interests. There is a legitimate interest in preventing disruption of the educational

process. The school and its students have an interest in maintaining some form of harmony in its student publications; avoiding the use of advertising pages to convey political or advocacy messages may serve this end. The school and its students also have an interest in fostering independent thought in student editors and may choose to do so by respecting those students' independent conclusions.

Further, there is more than one alternate forum available to Mr. Yeo. He was offered the opportunity to run a letter to the editor expressing his views. In many ways, this is a far more effective means of communicating his views that an advertisement. He may pass out leaflets on the sidewalk urging abstinence on the students. He may, and already has, used other media in the town to express his point of view. That Mr. Yeo is not able to express himself in the manner he finds most personally satisfying--that is, in an advertisement rather than in a letter to the editor--affects only one channel of communication. In such instances "there is only a slight loss in the social, or 'marketplace,' values inherent in the First Amendment. Thus a lower level of scrutiny is justified." Farber & Nowak, The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication, 70 Va. L.Rev. 1219, 1237 (1984).

***36** Neither the students nor the defendants violated the First Amendment, and this court should not, in the name of free speech, interfere with the editorial judgments made in this student newspaper and yearbook.

APPENDIX C.

United States Court of Appeals

For the First Circuit

131 F.3d 241

No. 96-1623

DOUGLAS E. YEO, Individually and on Behalf of His Children and as Chairman of the Lexington Parents Information Network,
Plaintiff, Appellant,

v.

Town of LEXINGTON, Jeffrey Young, Superintendent, David Wilson, Principal, Samuel Kafrissen, Karen Mechem and Joseph Dini, Chairman, John Oberteuffer, Lois Coit, Susan Elberger and Barrie Peltz, Individually and as They Are Members of the Lexington School Committee,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Richard G. Stearns, U.S. District Judge]

Before

Torruella, Chief Judge,
Bownes, Senior Circuit Judge,
Selya, Boudin, Stahl, and Lynch,
Circuit Judges.

*242John W. Spillane, with whom John J. Spillane and Gregory D. Smith were on brief for appellant.

Adam P. Forman, with whom Lois Brommer Duquette, Sarah A. Olivier, and Testa, Hurwitz & Thibeault, LLP were on brief for appellees.

S. Mark Goodman, Michael C. Heistand, Robert A. Bertsche, and Hill & Barlow for the Student Press Law Center, National Scholastic Press Association, Journalism Education Association, Scholastic Journalism Division of the Association for Education in Journalism and Mass Communication, Columbia Scholastic Press Advisers Association, New England Scholastic Press Association, and Yankee Press Education Network; Dwight G. Duncan for the Massachusetts Family Institute; James C. Heigham, and Choate, Hall & Stewart for Massachusetts Newspaper Publishers Association; Gwendolyn H. Gregory, Melinda L. Selbee, Timothy B. Dyk, John Bukey, Jones, Day, Reavis & Pogue for the National School Boards Association, Illinois Association of School Boards, and California School Boards Association's Educational Legal Alliance; Michael J. Long, Rosann DiPietro, and Long & Long for the Massachusetts Association of School Superintendents, on briefs amici curiae.

December 9, 1997

OPINION EN BANC

LYNCH, Circuit Judge. This case, involving speech interests on both sides, arises from the decision of two public high school student publications -- the newspaper and yearbook -- not to publish an advertisement. The advertisement promoted

sexual abstinence and was proffered by a parent, Douglas Yeo, in the aftermath of a decision by the Lexington, Massachusetts School Committee to make condoms available to students as a public health matter. Yeo had campaigned against the condom distribution policy and lost. The two high school student publications declined to publish the advertisement on the grounds that each had a policy, albeit unwritten, of not running political or advocacy advertisements.

The civil rights action brought by Yeo against the Town, the School Committee, Superintendent and school officials was terminated on defendants' motion for summary judgment. The district court judge concluded that no state action had been shown. A panel of this court, this judge dissenting, reversed, holding that summary judgment should be entered for Yeo on his claims that there was state action, that each student publication was a public forum, and that the ***243** decisions not to publish were impermissible view point discrimination. 1997 WL 292173 (1st Cir. June 6, 1997). This court granted en banc review[1] and withdrew the panel opinion. The en banc court now affirms the decision of the district court entering summary judgment for defendants on the ground that state action has not been shown.

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[1] The court acknowledges the assistance provided in the briefs amici curiae filed by the: National School Boards Association, Illinois Association of School Boards, and California School Boards Association's Educational Legal Alliance; Massachusetts Newspaper Publishers Association; Massachusetts Family Institute; Massachusetts Association of School Superintendents; Student Press Law Center, National Scholastic Press Association, Journalism Education Association, Scholastic Journalism Division of the Association for Education in Journalism and Mass Communication, Columbia Scholastic Press Advisers Association, New England Scholastic Press Association, and Yankee Press Education Network.

I. The Facts

We review the facts in the light most favorable to Yeo, the party opposing summary judgment, drawing all reasonable inferences from the record in his favor. Swain v. Spinney, 117 F.3d 1, 2 (1st Cir. 1997).

A. The Publications

This case involves two distinct Lexington High School (LHS) student publications, the LHS Yearbook and the LHS Musket. The Yearbook was operated entirely by a staff of about sixty students; all editorial, business, and staffing decisions were made by students. During the 1993-94 academic year, this staff was headed by two co-editors-in-chief, Dow-Chung Chi and Natalie Berger. Karen Mechem, a LHS teacher, was the Yearbook faculty advisor. Mechem was paid a stipend of less than $2,000 for that activity. Apart from Mechem's stipend and the use of LHS buildings and facilities, the Yearbook is financially independent from the school and is funded entirely through the sale of the books to students and advertising.

Like most yearbooks, the LHS Yearbook included pictures of seniors and other students, sections on sports, academics, and activities, and an advertisement section. This advertisement section was largely comprised of congratulatory or commemorative ads purchased by students and their families. As the Yearbook advertising order form suggested, student ads might include "[b]aby pictures; group photos taken in the setting of your choice, [or] pictures of meaningful people and/or places." A few advertisements were also sold to local busi-

nesses; most of these included congratulatory messages to the graduating class.

During the 1993-94 academic year, the Yearbook's unwritten policy was to publish advertisements from those local businesses which the students frequented or had some relationship with during their high school years. In keeping with this policy, students selling ads targeted those businesses that fit the Yearbook theme of fond memories. The Yearbook's policy was not to publish any political or advocacy advertising, including ads from candidates for student government.[2] The purposes of this policy were to ensure that the advertising section of the Yearbook was congruent with the rest of the publication and to prevent the Yearbook from becoming a bulletin board for competing issue groups or candidates in a way that would interfere with the commemorative purpose of the Yearbook.

The LHS Musket is a student-written and edited newspaper that is published four or five times a year. All editorial, operational, and staffing decisions are made by the student editors. During the 1993-94 academic year, Ivan Chan served as the Musket's editor-in-chief, Dong Shen was the business manager, and Samuel Kafrissen was the faculty advisor. Students do not seek or obtain the approval of the faculty advisor

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[2] The record does not reveal whether political or advocacy advertising other than the ad giving rise to this litigation was ever submitted to the Yearbook or the Musket. However, those affiliated with the Yearbook and the Musket believe that neither has ever published a political or advocacy message or accepted an advertisement from a political or advocacy organization. Yeo offers no evidence to the contrary, and the record, which contains the advertising sections of several Yearbooks, bears out defendants' description of the types of congratulatory advertising printed. No evidence was produced that the Musket had ever printed a political or advocacy advertisement.

for any *244 editorial or operational decisions. Kafrissen is paid a stipend of $1,373 by LHS, and the Musket receives about $4,500 a year from the School Committee. The Musket has no physical facilities at LHS, other than a mail box; all the layout is done at editors' homes. The Musket typically includes news articles about the high school, features, editorials, letters to the editor, sports coverage, and humor columns, all written, edited, and produced by students. The Musket is described in literature distributed to the student body as being a "student run newspaper" which is "written, edited and distributed by students." The editorial page bears a legend stating expressly that the opinions stated there are those of the student editors or newspaper staff and not of school policy.

Not every issue of the Musket contains advertising. Those that do contain two or three small ads from businesses that cater to student tastes. During the 1990s, those advertisers have included a bookstore, a video store, a music store, a driving school, a deli, a hair salon, SAT prep courses, and, around prom time, a tuxedo rental store and a dress shop. For the 1993-94 school year, the Musket created an "Advertisement Form" for potential advertisers. The form stated that: "The award winning Lexington High School student newspaper provides area businesses and non-profit organizations the opportunity to place advertisements in the Musket." The form did not state that ads were subject to editorial approval, although it did note that, depending on the issue, ad size might have to be adjusted and ads might have to be edited, by the paper's staff, for length. The form also stated that "[p]ayment . . . for an ad will occur only if and after we publish an ad." (emphasis added).

Pursuant to an unwritten policy, the Musket has never accepted advocacy or political advertising, including that from

candidates for student government. The purpose of this policy was to prevent the Musket from becoming a "bulletin board" for warring political ideas. The students also rejected the idea of allowing cigarette ads in the paper for fear that such advertising would be read as an endorsement of smoking.

B. Yeo's Submission of Advertisements

In 1992, the Lexington School Committee adopted a policy making condoms available to students at LHS without parental permission. This measure was the subject of political controversy in Lexington, and Douglas Yeo, a town resident and parent, emerged as a leading opponent of condom distribution and other "safe sex" policies. Yeo headed a group called "Lexington Citizens for Responsible School Policy," which sponsored a non-binding town-wide referendum on the School Committee's condom policy.

The Musket ran both news articles and editorials on the policy and the referendum. Yeo thought these articles misrepresented his group's position. In January 1993, Yeo requested a meeting with LHS Principal David Wilson concerning his grievance. Wilson suggested that Yeo submit a letter to the editor correcting the alleged inaccuracies, but advised Yeo that any decisions regarding corrections would have to be made by the student editors. Yeo did not contact the student editors. In March 1993, the voters of Lexington approved the condom distribution policy.

Subsequently, in May 1993, Yeo founded the Lexington Parents Information Network ("LEXNET"). LEXNET's stated goal was to distribute information about public education to parents via newsletters and meetings.

1. The Yearbook Ad

On November 1, 1993, Yeo, as Chairman of LEXNET, submitted a full page ad to the 1994 LHS Yearbook. The ad copy read:

We know you can do it!
ABSTINENCE: The Healthy Choice
Sponsored by: Lexington Parents Information Network
(LEXNET)
Post Office Box 513, Lexington, Massachusetts 02173.

The ad was accompanied by a check for $200.00.

Mechem, the Yearbook advisor, acknowledged receipt of the check and placed the ad ***245** in a drawer without giving it a second thought. In keeping with Yearbook procedures, the LEXNET ad was "warehoused" in a drawer with other ads pending submission to the publisher for the printing of proofs. Natalie Berger, a senior and co-editor-in-chief, noticed the ad in the drawer and felt that the ad was "out of context" with the advertising section of the Yearbook. However, she decided to postpone a publication decision until she saw the ad in proof form, which was typically when critical editorial decisions were made.

In January 1994, a large number of proofs, including those of Yeo's ad, came back from the printer. All the student editors attended an editorial meeting at which they looked over the various ads and copy. After much discussion, the editors decided that Yeo's ad was a political advocacy statement that was out of context with the rest of the Yearbook and that had no place in that publication. Although the students decided to reject the ad as drafted, they still wished to include a message

from LEXNET if the ad could be rewritten to conform with the rest of the Yearbook. The students did not consult with Mechem or any other member of the faculty or administration prior to making this decision.

The Yearbook editors asked Mechem to notify Yeo of their decision. The students also asked Mechem to convey their request that Yeo's ad be revised to express a congratulatory graduation message. On February 1, 1994, Mechem called Yeo, and told him that the students would like to have the ad rewritten. Yeo refused to revise the ad and threatened to sue the Yearbook unless his ad was published as submitted.

The student editors discussed the issue again, and decided to stand by their original decision to reject Yeo's ad. They asked Mechem to write to Yeo, returning his check. On February 4, Mechem wrote to Yeo:

> Because of the non-controversial nature of the advertising section of the yearbook, we have decided not to print the advertising you have submitted. Please accept my apologies for the inconvenience that our reviewing procedure may have caused.

A $200 check was enclosed. Mechem told Principal Wilson about Yeo's ad and the students, decision to reject it.

Yeo replied by fax on February 13, 1994, writing:

> Based on our understanding of the right of equal access and free speech, we do not accept your rejection of our ad and ask that you reconsider your decision to censor it. We will not be cashing your check at this time.

> Should you not reverse your decision, we will avail ourselves of every possible avenue open to us in order to protect our rights as advertisers.

2. The Musket Ad

On January 3, 1994, Yeo wrote to Dong Shen, a senior and the business manager of the Musket, requesting information about advertising procedures and rates. The letter was not on LEXNET stationary and did not identify Yeo as a member of that group. Receiving no reply, Yeo wrote to Shen again on January 20, requesting the information "as soon as possible," and copying Ivan Chan, the editor-in-chief, on the letter.

On January 25, Shen wrote to Yeo, providing the requested information and taking full personal responsibility for the delayed response. Shen concluded by noting, "Of course ads are still subject to the approval of the editorial board."

On February 1, 1994, Yeo submitted an ad to the Musket. The text was identical to the Yearbook ad previously submitted, except that, above LEXNET's address, it contained the line: "For accurate information on abstinence, safer sex and condoms, contact: [LEXNET]."

The student editors of the Musket discussed the ad extensively. In mid-February, they met and decided that Yeo's ad constituted a political statement that they would not run as a matter of policy. On February 24, 1994, Shen wrote to Yeo:

> After careful consideration of your advertisement from LEXNET, the Musket came to the difficult decision of not printing it. In no way did we want to limit your right to express your

> opinion, but we could not *246 accept a political statement as an advertisement. Our own advertisement policy dictates so for good reasons. If we were to accept a politically aligned advertisement, we at the Musket would feel obligated to accept other political statements that might come our way. We do not wish to put ourselves in such position. Ultimately Ad space is not a public forum and for that reason the Musket reserves the right to select what Advertisements it chooses to print. If you have any question feel free to contact the Musket.

The decision was made, and the reply written, by the student editors without consulting Kafrissen, the Musket faculty advisor, or requesting his, or any other adult's approval. In fact, Kafrissen did not even know about the ad's submission until the time of the editorial meeting, and did not see the ad or the students' response until after the reply had been sent.

Sometime the next week, Principal Wilson called Kafrissen and informed him that Lexington's Town Counsel, Norman Cohen, had been contacted by Yeo's lawyer; the lawyer had threatened to sue the town and the school authorities if the ad was not run. Cohen thought that it would be best to avoid a lawsuit and requested that the students publish Yeo's ad. Kafrissen and Wilson agreed to look into the legal issues in greater depth and to discuss the matter with the students.

On March 1, 1994, the student editors of the Musket met with Kafrissen. Kafrissen informed them of Yeo's actions. Although a number of students at the March 1 meeting supported Yeo's pro-abstinence views, they were concerned that

the Musket might turn into a bulletin board for advocacy on lifestyle issues. Additionally, the students were uncomfortable with having to run an ad because someone had threatened to sue them if they did not. The editors once again decided to reject the ad. They asked Kafrissen to contact Yeo and to invite him to present his views in a "letter to the editor."

Kafrissen, on behalf of the Musket, wrote to Yeo that day. In the letter, Kafrissen suggested that Yeo write a letter to the editor:

> We have long considered the Letters to the Editor section of the Musket to be a public forum. Historically we have accepted and printed on these pages any and all "short and tasteful" letters that have come to us. We would welcome such a letter from your organization in which you would probably be able to explicate your position on abstinence more fully than you would be able to in an ad format. We have heard that you feel that school publications have prevented you from presenting your message to the student body. Therefore we suggest that you use the medium of a letter to get your message across in greater detail, and without charge.

The letter concluded by noting that, if Yeo were successful in forcing the Musket to print the ad, this would have the negative consequence of removing editorial control from the student staff.

Yeo declined the offer on March 7 in a letter to Kafrissen. In that letter, Yeo explained that his organization decided to sponsor the ads for two reasons:

> Firstly, we had a simple message we wanted to get out that would affirm abstinent students in the LHS community. . . . There is nothing controversial or political in our message. Secondly, I wanted to see if the Musket and Yearbook would react as I thought they would. They did. In spades.

Accordingly, Yeo declined to write a letter to the editor, which, he felt, could not make the point as concisely as an ad could. Yeo insisted that the ad be run as submitted, "as is our legal right," and concluded, "You don't have to agree with it. You don't even have to like it. You just have to print it. Touché."

C. The Administration's Response and the Students' Decisions

On March 1, Yeo met with Principal Wilson to discuss the ads. Yeo believes that, at that meeting, Wilson assured him that the ads would be printed, and told him that the Town Attorney had advised publication.

Meanwhile, as the controversy heightened, the students and faculty alike were seeking advice from various sources. Mechem told ***247** Wilson that Dow-Chung Chi, the Yearbook' s co-editor-in-chief, had asked her: "If we don't print the ad, what law are we breaking?" In an attempt to answer his

question, Mechem talked with Wilson, Kafrissen, and the Student Press Law Center in Washington, D.C. Several of the student editors of the Musket and the Yearbook sought advice from the Student Press Law Center and the Civil Liberties Union of Massachusetts, as well as from attorneys they knew personally. The students were told by these various sources that, under the federal Constitution and Massachusetts law, student editors had the right to decide what was printed in their publications.

On March 11, 1994, LHS officials and student editors met in the office of the Superintendent of Schools, Jeffrey Young. Yearbook editors-in-chief Berger and Chi, Musket editor-in-chief Chan, advisors Kafrissen and Mechem, Superintendent Young and Principal Wilson attended. Young asked questions to determine what the students' reasoning was, and to determine that they had engaged in a thoughtful process prior to the meeting. The administrators and faculty were impressed with the way the students outlined the issues. Young concluded by stating that he would like to do further research and to obtain legal advice.

In mid-March, Musket editor-in-chief Chan was approached by a group of students who were offended by Yeo's efforts and who wished to place a "counter ad" in the Musket. The proposed ad looked exactly like Yeo's ad except that, in place of "Abstinence: The Healthy Choice," it read "Safe Sex: The Healthy Choice." Chan decided to reject the counter-ad, and informed the staff that it would not be published.

On March 13, Chan called a meeting of the entire Musket staff; Kafrissen was not invited and did not attend. At that meeting, Chan briefed the students on the events surrounding the submission of Yeo's ad. The student staff unanimously opposed publication of Yeo's ad.

On March 18, second meeting was held in Superintendent Young's office. In addition to the prior participants, Lexington School Committee members attended. (LHS Assistant Principal Lawrence Robinson attended in Principal Wilson's stead). The Musket and Yearbook editors reiterated their refusal to run Yeo's ads. The school officials and School Committee members warned the students of the possible consequences of their decision, including litigation, and described the potentially unpleasant media exposure the students could expect. Although the students felt that the school officials wanted them to print the ads, the officials maintained that it was the students' decision to make. The students were repeatedly advised that the ultimate decision about publication of the advertisement was theirs to make and the school administration would stand by their decision.

Following the March 18th meeting, Chan held several further discussions with individuals and groups from the Musket's staff. Finally, with the staff's support, Chan conclusively decided not to run Yeo's ad as a matter of policy.

On April 11, 1994, the Superintendent again met with the Musket staff and again told them the decision was theirs. Throughout Young's tenure as Superintendent, the Musket has been operated as an independent student-run newspaper and he has never authorized any school official to interfere with the students' decision on what to publish. Yeo offers no evidence to the contrary.

As for the Yearbook, Chi and Berger asked Mechem to invite Yeo, on the students' behalf, to a meeting at which alternatives could be discussed. Yeo wrote to Mechem on March 28, informing her that, on the advice of counsel, he would not be able to meet with the student editors, and requesting that all

further inquiries be addressed to his lawyer at the Rutherford Institute in Virginia.

Berger then called a meeting of all the Yearbook section editors. Mechem attended the beginning of the meeting and urged the students to consider the school officials' advice. Mechem then left the meeting. The students discussed the issues raised at the March 18 meeting. The students reaffirmed ***248** their decision to reject Yeo's ad. Chi and Berger then drafted a memo to Superintendent Young and the School Committee. It concluded:

> After much discussion and deliberation, the reasons for our decision are as follows. The nature of the advertisement, which promotes a style of life, regardless of the message, does not coincide with that of the rest of the advertisement section of the yearbook. The inclusion of this type of advertisement would also establish an unsuitable precedent for the future of the yearbook.

This litigation followed.

During the 1994-95 school year, the new student editors of the Yearbook decided not to accept any advertisements other than personal notes from parents and students. Yeo resubmitted his ad in September 1994, but it was rejected under the new policy. The 1994-95 Musket staff drafted explicit "Advertisement Policies and Procedures, " to be distributed with advertisement forms, which states the type of advertisements, including those from "political organizations, referen-

dum issues, advocacy groups, [and] public service organizations," that the Musket will not print.

The newspaper in its news pages gave extensive coverage to the controversy between it and Yeo, thus providing Yeo with coverage of his pro-abstinence position.

II. Procedural History

Yeo's action under 42 U.S.C. § 1983 alleges that the refusal of the two publications to print the advertisements violated his rights to free speech and equal protection under the U.S. Constitution and Art. 16 of the Massachusetts Declaration of Rights. Yeo sued the Town, School Committee, Superintendent, Principal, and faculty advisers but did not name the students as defendants.

The defendants moved for summary judgment on various grounds, including, inter alia, the lack of state action, that no public forum had been created, and qualified immunity. Yeo opposed summary judgment, but did not submit a statement of disputed facts in opposition to summary judgment as required by Local Rule 56.1 of the District of Massachusetts. Yeo conceded at his deposition that he had no personal knowledge of the decision making processes followed by the Yearbook and the newspaper in rejecting his advertisement. The district court granted summary judgment on the state action issue without reaching the other issues. we affirm on the same ground.

III. State Action

The essential state action inquiry is whether the government has been sufficiently involved in the challenged actions that it can be deemed responsible for the plaintiff's claimed

injury.[3] If there is no state action, then the court may not impose constitutional obligations on (and thus restrict the freedom ***249** of) private actors.[4]

This is a situation in which the government actors the school officials acting under a statute[5] of the Commonwealth

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[3] The 'under color of law' requirement of §1983 "has consistently been treated as the same thing as the 'state action', required under the Fourteenth Amendment," United States v. Price, 383 U.S. 787, 794 n. 7, 86 S.Ct. 1152, 1156-57 n. 7, 16 L.Ed.2d 267 (1966). Indeed, the Supreme Court has reversed an appellate court which treated the two analyses as separate. Lugar v. Edmonson Oil Co., 457 U.S. 922, 924, 928, 929, 102 S.Ct. 2744, 2746-47, 2749, 2749-50, 73 L.Ed.2d 482 (1982). This court has consistently treated the analyses as the same. See Barrios Velazquez v. Asociacion de Empleados, 84 F.3d 487, 490-491 (1st Cir. 1996). Where the statutory and constitutional inquiries are inextricably intertwined, decision of the state action question is hardly a breach of the obligation to decide cases on statutory grounds in order to avoid constitutional questions. We do not engage in a separate § 1983 analysis, nor do we reach the issue of municipal liability, under Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). or of qualified immunity claimed by the individual defendants. The district court ruling did not reach any of these issues. Judge Stahl's concurrence suggests that we leap over the question of state action to address a statutory issue of causation, an unusual approach. The question whether Yeo even has a First Amendment right to assert depends on whether there is state action. The Supreme Court and the circuit court cases described above have consistently addressed the state action question before addressing questions of causation. See also Polk County v. Dodson, 454 U.S. 312, 325, 102 S.Ct. 445, 453-54, 70 L.Ed.2d 509 (1981) (examining § 1983 defense of no municipal custom only after examining state action issue) Further, courts ordinarily address questions of jurisdiction first, and the presence of state action is "a jurisdictional requisite for a § 1983 action." Id. at 315, 102 S.Ct. at 448.

[4] See, e.g., Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619-20, 111 S.Ct. 2077, 2082-83, 114 L.Ed.2d 660 (1991) (discussing the relevance of the "state action" requirement to private freedom).

[5] Mass. Gen. Laws ch. 71 §82 provides, in pertinent part:

of Massachusetts -- have chosen to grant editorial autonomy to these high school students. The state action analysis is thus placed squarely in a very complex and changing area of law.

The modern state action decisions of the Supreme Court do not rely on a single analytic model applied regardless of the fact patterns involved. As this Court once observed, the "state action inquiry is 'necessarily fact-bound.'" Ponce v. Basketball Federation of the Commonwealth of Puerto Rico, 760 F.2d 375, 377 (1st Cir. 1985) (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 939, 102 S.Ct. 2744, 2754-55, 73 L.Ed.2d 482 (1982)). The analytic model used must take account of the specific constitutional claim being asserted, here, one under the First Amendment.[6] Cf. Polk County v. Dodson,

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> The right of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder within the school. Freedom of expression, shall include without limitation, the rights and responsibilities of students, collectively and individually, . . . to write, publish and disseminate their views . . . . No expression made by students in the exercise of such rights shall be deemed to be an expression of school policy and no school officials shall be held responsible in any civil or criminal action for any expression made or published by the students.

Mass. Gen. Laws ch. 71, § 82; see also Pyle v. School Comm., 423 Mass. 283, 667 N.E.2d 869 (Mass. 1996) (holding that the statute protects even vulgar speech so long as no disruption or disorder results). We express no view on whether state law would have permitted the school to override the students' decisions. As we explain, the state's student speech law may be a factor in the state action inquiry, but the issue for us is ultimately one of federal constitutional law.

[6] The "search for state action . . . ends by identifying the precise substantive constitutional issue to be addressed." Tribe, American Constitutional Law § 18-6, at 1715 (2d ed. 1988). See also 1 Nahmod, Civil Rights

454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981) (state action inquiry shifts depending on constitutional question asked). "Faithful adherence to the 'state action' requirement . . . requires careful attention to the gravamen of the plaintiff's complaint." Blum v. Yaretsky, 457 U.S. 991, 1003, 102 S.Ct. 2777, 2785, 73 L.Ed.2d 534 (1982). As the Supreme Court has noted:

> We recognize that the First Amendment, the terms of which apply to governmental ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech -- and this is so ordinarily even where those decisions take place within the framework of a regulatory regime . . . .

Denver Area Telecomm. Consortium, Inc. v. Federal Communications Comm'n, ___ U.S. ___, ___, 116 S. Ct. 2374, 2383, 135 L.Ed.2d 888 (1996).

The state action issue implicates a myriad of players, only some of whom are defendants. Yeo sued only those individuals who are public school administrators, teachers, or members of the Lexington School Committee. They are concededly state actors. He did not sue the student editors. But the "action" of which Yeo complains was an action taken by the students. The "actions" he assails were the editorial judgments

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and Civil Liberties Litigation: The Law of Section 1983 § 2.04, at 63 (3d ed. 1991) (" [S]tate action is not a unitary concept, but varies depending on the constitutional violation asserted.").

not to publish his advertisement. Those judgments were made by the students, who are not parties.

There are expressive interests involved on both sides of this case. Yeo's are obvious. Those on the other side are perhaps less obvious. The identification of these interests puts the state action question in context.

If the actions by the students are themselves state action or may be attributed to the school officials and provide the basis for state action, the inevitable legal consequence will be some level of judicial scrutiny of the ***250** students' editorial judgments.[7] The inevitable practical consequence will be greater official control of the students' editorial judgments. Both consequences implicate the students' First Amendment interests which are far from negligible. Cf. Hazelwood Sch. District v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (acknowledging but ruling against student speech interests when school officials overrode students' editorial judgments and withdrew certain material from pages of high school newspaper) Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 252, 94 S.Ct. 2831, 2836, 41 L.Ed.2d 730 (1974) ("[I]mplementation of a remedy such as [government] enforced access" to pages of a private newspaper "brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years.").

In addition, the defendant school officials themselves have an interest in their autonomy to make educational decisions.

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[7] We do not accept the suggestion of Judge Stahl's concurrence that the students are private actors with respect to reporting and editorializing and that they are not with respect to the advertising decisions. Whatever role such a distinction may play in a limited public forum analysis, the distinction offers little assistance here.

The officials have determined that the best way to teach journalism skills is to respect in the students' editorial judgments a degree of autonomy similar to that exercised by professional journalists. That choice by the officials parallels the allocation of responsibility for editorial judgments made by the First Amendment itself. The Supreme Court has "oft expressed [the] view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." Hazelwood, 484 U.S. at 272, 108 S.Ct. at 571.

The leading Supreme Court decisions concerning high schools and students are all meaningfully different from this case, and thus provide little guidance on the state action question. Each of those cases involved a claim by students that the actions of public school administrators violated their constitutional rights. For example, in Hazelwood, plaintiff students contended that officials violated the First Amendment by deleting articles from student newspaper. State action was simply not at issue in Hazelwood because the relevant actions were admittedly taken by public school officials.[8] Id., 484 U.S. at 264. The same is true of earlier decisions, all of which involve student claims against those running the schools. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (civil rights claim by student disciplined by offi-

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[8] Thus, when the Supreme Court in Hazelwood discusses whether "school-sponsored publications that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school," 484 U.S. at 271, 108 S.Ct. at 570, that discussion was pertinent to whether there was an intent to create a public forum. Hazelwood did not create a new state action analysis that any school sponsored activity which bears an imprimatur of the school thus constitutes state action.

cials for language used in school assembly); Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (student claim that principals' regulation against armbands violated First Amendment); see also Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) (student Fourth Amendment claim against school district). Here, in contrast, the question is whether the actions by students may fairly lead to a conclusion there is state action.

Each court of appeals which has considered the state action requirement in the context of attempts to attribute student-controlled editorial decisions in public institutions of higher education to public officials has found no state action. In Leeds v. Meltz, 85 F.3d 51 (2d Cir. 1996), the court found no state action where school officials and students were sued over the decision by student editors of a newspaper in a state-supported law school to reject an ad. See id. at 55. In Sinn v. The Daily Nebraskan, 829 F.2d 662, 665 (8th Cir. 1987), the court held that there was no state action in the refusal to print an ad where the student paper "maintains its editorial freedom from the state." In Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1075 (5th Cir. ***251** 1976), a similar result was reached in a suit against the newspaper editor where the students elected the editor and university officials did not control or supervise editorial judgment about what to publish. In Avins v. Rutgers, 385 F.2d 151, 153-54 (3d Cir. 1967), without expressly discussing the state action issue, the court held that a state-supported law review's rejection of an article did not violate the First Amendment because editorial discretion is a necessary component of publishing a journal. Yeo argues that cases involving public universities are not on point, given the state's potentially greater role in controlling the behavior of

younger, high school students. But it is also true that the autonomy given to these high school students renders them more like their older counterparts and renders those cases highly relevant.

The only decisions we have found which assume there is state action do so where the parties agreed there was state action and it was undeniable the decision makers were government officials. The decision by the Ninth Circuit in Planned Parenthood of Southern Nevada Inc. v. Clark County School District, 941 F. 2d 817 (9th Cir. 1991), is inapposite as state action was conceded. There the school officials themselves controlled the school publications and decided to reject the advertisement from the plaintiff organization. Id. at 820. Likewise, in Lee v. Board of Regents, 441 F.2d 1257 (7th Cir. 1971), state action was conceded where the student newspaper was a "state facility".

While all parties appropriately point us toward the state action analysis in Rendell-Baker v. Kohn, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982), that case is rather the mirror of this. Rendell-Baker involved a claim that private school officials were state actors. Here the claim is that public school officials may be sued based on the actions of students. The students are themselves at least facially private actors.

The theories for (and against) state action basically devolve here into three categories of analysis. First, is there state action because the decisions not to publish were actually made by or controlled by the school officials? (Even if the decisions were not directly made by the school officials, those officials, Yeo argues, exerted such influence as effectively to determine the outcome of the student decisions.) This is primarily a factual question.

Second, even if the state did not actively direct or control the decisions, was the state required to intervene, and to do so in such a way as to provide a basis for a state action finding? This is primarily an issue of law.

Third, even if the decisions were made independently by the students, may the decisions of the students fairly be attributable to the school officials because of the public school setting? The material facts are undisputed; the question is what conclusion to draw from these facts. We take each argument in turn.

A.

Yeo argues that the decisions were made or controlled in fact by the school officials, but the record does not support that conclusion.[9] The students and each of the involved *252

[9] Yeo calls our attention to the fact that the advisors authored some of the correspondence, using the term "we," and to the fact that, on a separate occasion, Kafrissen threatened to resign if the students did not take his advice. It is true that Kafrissen and Mechem used the word "we" in letters to Yeo. However, the letter from Kafrissen was written after Dong Shen had already communicated the students' rejection of the ad to Yeo. As for Mechem's correspondence, Mechem and the Yearbook editor both stated unequivocally that the decision was made by the students prior to consultation with Mechem, and that Mechem wrote to Yeo at the student editors' request. As to Kafrissen's threat to resign, the incident only serves to illustrate that Kafrissen did not believe he had the authority to order the students around. His actual description of the incident is as follows:

> I have never ordered (nor do I have the authority to order) the student editors not to run an editorial, news or feature article or any advertisement. I have used persuasion to address matters that seemed over-the-line. On one occasion, for example, when I disagreed strongly with a proposed student editorial, which, in my opinion, took an extremely irresponsible position, I was prepared to resign if my advice to withdraw the editorial was not ac-

school officials say that the students, and not the school officials, made the decision. Yeo has offered nothing to contradict that.

Nonetheless, the state action cases recognize that government should not be shielded when it is the real actor behind the scenes or when it joins in a charade designed to evade constitutional prohibitions. See Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953) (Democratic Party "club" was a state actor designed to evade constitutional prohibition against all-white primaries); cf. Morse v. Republican Party of Virginia, 116 S. Ct. 1186, 134 L.Ed.2d 347 (1996). That is not true here. This is also not an instance in which the government knowingly profits from the racially discriminatory behavior of a privately owned enterprise. See, e.g., Burton v. Wilmington Parking Auth., 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961); Blum, 467 U.S. at 1010-11, 102 S.Ct. at 2788-89. That type of symbiotic relationship has been found to create state action where the government tacitly endorses and becomes entangled with private racial discrimination. Burton, 365 U.S. at 724, 81 S.Ct. at 861. Even if that race discrimination model for state action were imported here, there is

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cepted. The editors engaged in an extensive debate and consulted with their parents before finally agreeing to withdraw the editorial.

There is nothing in the record even to suggest that Kafrissen engaged in such persuasive techniques with regard to the Yeo ad; rather, the uncontradicted evidence is that Kafrissen took prophylactic measures to ensure that the students felt free to make their own decision. At bottom, Yeo's claim of control amount to no more than "conclusory allegations, improbable inferences, and unsupported allegations." Fennell v. First Step Designs, td., 83 F.3d 526, 536 (1st Cir. 1996) (citations and internal quotation marks omitted).

no evidence the school officials tacitly endorsed or benefitted from the students' decisions not to run Yeo's ads.

The state action cases also consider "de-privatizing" and attributing to the government the actions of private persons where the state has been involved in the sense of delegating traditional governmental authority to a private actor.[10] In Edmonson, a private litigant is race-based exercise of peremptory challenges was found to be state action. Edmonson, 500 U.S. at 621, 111 S.Ct. at 2083. The running of trials is a government function and it is the judge who, based on the challenge, excuses the juror. The publishing of a newspaper or a yearbook is most emphatically not a traditional function nor an exclusive prerogative of the government in this country. Private schools commonly have student newspapers, and public schools not uncommonly have independent student newspapers. The delegation of governmental function theory does not establish state action. See Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978) (sale of goods in storage by warehouseman did not constitute state action); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974) (private utility which terminated electric service was not state actor)

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[10] The school officials point to NCAA v. Tarkanian, 488 U.S. 179, 109 S.Ct. 454, 102 L.Ed.2d 469 (1988), where an unincorporated association of public and private colleges was found not to be a state actor even though the association's actions led a public college to take disciplinary action against a basketball coach. But in this case the state actors, the adults, have a supervisory relationship to the private group, the students, and are thus somewhat the inverse of the NCAA and the public college.

B.

Secondly, while there may be rare occasions when a state has a duty to intervene in actions taken by private persons which could give rise to a state action finding, this is not one.[11] See Ponce, 760 F.2d at 379-80 (although there may be some occasions in which " [t]he government should be responsible for failing to act where it should act," there was no state action because the government had no affirmative duty to regulate amateur sports leagues). Cf. DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) (finding that the Due Process Clause imposes no affirmative duty on the government to protect citizens from deprivation of life, liberty or property by ***253** private actors). Here, the state statute, Mass. Gen. Laws ch. 71, § 82, appears to have been intended, in part, to express Massachusetts' policy judgment that student editors of high school publications generally have editorial autonomy from school officials and that their decisions are not state action. While the state statute cannot be determinative of the outcome of the federal constitutional question, Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 391-93, 115 S. Ct. 961, 971, 130 L.Ed.2d 902 (1995) (statutory declaration that Amtrak is not a government entity not dispositive of governmental action question where constitutional rights are involved), no such duty to act is imposed by state law.

The First Amendment free speech and free press guarantees do not involve a duty by the government to act where there is otherwise no state action. Indeed, those guarantees are largely

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[11] For example, state officials could not personally stand by and watch privately-contracted-for prison guards beat a prisoner to death, and then defend on the ground of no state action.

based on prohibitions against government action.[12] "The First Amendment does not reach acts of private parties in every instance where the [government] has merely permitted or failed to prohibit such acts." CBS v. Democratic Nat'l Comm., 412 U.S. 94, 119, 93 S.Ct. 2080, 2095, 36 L.Ed.2d 772 (1973) (plurality opinion). In CBS, a plurality of the Supreme Court found that the decisions of broadcasters not to accept any editorial advertising were not government action for purposes of the First Amendment, even though the government both licensed and heavily regulated the broadcasters. Id. at 116-19. As a matter of law, we see no legal duty here on the part of school administrators to control the content of the editorial judgments of student editors of publications. Such a duty -- which Yeo in his briefing suggested could be derived from the traditional government function of running schools and the "symbiotic relationship between the publications and the school -- does not exist and cannot support state action.

C.

We are left with the third theory: that the actions by the students should be attributed to the school officials, despite the officials' lack of actual or effective control and the lack of any duty. The key issue is whether the conduct may be "fairly attributable to the state." Barrios v. AEELA, 84 F.3d 4871, 491 (1st Cir. 1996) (citations and internal quotation marks omitted) (no state action where state did not compel organization of

[12] The state action question also cannot be resolved against Yeo on the grounds that the Constitution prohibits the state actors, the school administrators, from acting to interfere with the student editors. Hazelwood forecloses such a conclusion.

governmental employees of Puerto Rico to act, no traditional government function involved, and no interdependence and joint participation with state is shown).

Of course, the fact that the newspaper editors are public school students does not, in itself, make them state actors. Persons do not become state actors because they are clients of government services, whether they are students, hospital patients, or prison inmates. Some, like the students, are government clients by compulsion here, the truancy and mandatory education laws compel the students' attendance.[13] They may not be converted to the status of government actors simply on such a basis.

Yeo argues, using the Rendell-Baker terminology, that there is a sufficient nexus to attribute the students' actions to the state. But examining the nexus here between state regulation and financial support of the publications and the challenged decisions militates against a state action finding. See Blum v. Yaretsky, 457 U.S. at 1004; Rendell-Baker, 457 U.S. at 838-41. It is established that a private institution's receipt of state funding does not render that institution's decisions state action. Rendell-Baker, 457 U.S. at 840. This can be so even ***254** when the institution's budget is almost entirely derived from public money. Id. Here, the publications are the institutions at issue.

The Yearbook receives no money from the school system other than the indirect assistance it gets from the small stipend received by its faculty advisor. The Musket does receive

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[13] We distinguish those § 1983 cases where the plaintiff is himself a compulsory client of the government, such as is true in suits by persons in custodial care of the state, and sues otherwise private actors who provide services under contract with the state. See West v. Atkins, 487 U.S. 42 (1988) Miranda v. Munoz, 770 F.2d 255 (1st Cir. 1985).

greater financial assistance. Much of its operating costs as well as its advisor's stipend are paid by the school system. However, these facts are far from conclusive. The focus in Rendell-Baker was on the interplay between the action at issue and the state funding and regulation, not merely on the amount of state aid or oversight. Id. There was no interplay between the decision not to publish the advertisement and the state's provision of financial and faculty support. That the principal kept the checkbook for the school newspaper had nothing to do with the students' decisions whether or not to run the ads.

Yeo's "nexus" argument turns on context. The Yearbook does memorialize in photographs the experiences and personalities in a public high school class. The newspaper is the newspaper of the public high school; its name is the "Lexington High School Musket" and it identifies itself with the high school in its communications and interactions with other students and the community. It does receive some financial support from the school and the faculty advisors may have some subtle influence. The newspaper exists in the form it does because the school authorities and state law permit it to do so. While not part of the for-credit educational curriculum, work on the Musket does have explicit educational value and provides an attractive credential for students. The student editors perform some of their functions on school grounds, perhaps even during school hours. All of these factors support Yeo's argument. It is a close question whether the injury caused here "is aggravated in a unique way by the incidents of government authority." Edmonson, 500 U.S. at 622 (citation omitted).[14]

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[14] Cf. Marjorie Heins, Viewpoint Discrimination, 24 Hastings Const. L.Q. 99, 159 (1996) ("Public education presents a paradoxical situation: it

The Supreme Court has taught that the state action question may shift depending on the context and the question asked. A public defender is not a state actor in her representation of a criminal defendant, even though she may be one in the performance of other duties, such as hiring or firing decisions. See Polk County, 454 U.S. at 324-25. Even acknowledging that the public defender is a state employee, Polk County considered it important that, in the actual function of defending the client, the public defender's relationship to the state was necessarily independent, and even adversarial, and that the defender exercised independent judgment in the same manner as did attorneys in the private sector. Id. at 321-22. So too here.[15]

Here, the students' relationship to the public school officials in the exercise of their editorial judgment was certainly independent. At times, it was close to adversarial. The school officials gained nothing but a lawsuit from the students' decision, and the officials might themselves, as they told the students, have made a different decision. It is not enough to create state action that the decisions took place in a public school

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is government speech for some purposes, yet also a quintessential forum for intellectual growth [and] exploration. . . .")

[15] Similarly, in Edmonson, not all of the litigation decisions of the defendant private company were deemed to be state action; only the race-based exercise of peremptory challenges were. See Edmonson, 500 U.S. at 621-22. This was, in part, because "[r]acial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality." Id. at 628. Where such interests are at stake, the acquiescence of a government actor in the discriminatory actions of a private party may implicate the Constitution. For example, if this were a claim brought by a student who had been excluded from election to the editorial board on account of her race, and the school officials declined to intervene, the analysis would focus on a different decision and most likely would reach a different result.

setting, that there was some governmental funding of the publication, that teachers were acting as advisors, and that the state actors made an educational judgment to respect the autonomy of the students' editorial judgment.

***255** Where, as here, there are First Amendment interests on both sides of the case, the analysis of whether there is state action must proceed with care and caution. Because the record establishes that the editorial judgment exercised was the independent judgment of the student editors of both publications, we resolve the question of state action against Yeo.

The decision of the district court is affirmed.[16] Costs are awarded to the Town of Lexington and the defendant school officials.

Concurrences follow.

TORRUELLA, Chief Judge (Concurring). I concur with the majority opinion but write separately to highlight an important issue that the majority fails to address -- the absence of a public forum.

The regulation of speech in forums that have traditionally been available for public expression is subject to the highest degree of scrutiny. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). These "traditional public forums" include streets, sidewalks and parks. Id. In order to further aid citizens' political discourse, the state may, from time to time, create a new public forum for the views of the community. The regulation of speech in these "designated" public forums is also subject to strict scrutiny. See id. at 46.

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[16] The motion to strike filed by Yeo in this court is denied as immaterial and moot in light of the court's opinion.

However, it is simply not true, as a matter of constitutional law, that each time a state actor solicits advertising, a designated public forum has been created by the government. See Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (city may solicit advertising for its rapid transit cars while refusing political and public issue advertising).

The Supreme Court has held that "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985) (emphasis added) ; see also International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680 (1992) (when the government opens a forum for certain types of speech, a public forum has not been created unless the government intended to create a forum without limitations); United States v. Kokinda, 497 U.S. 720, 730 (1990) (plurality opinion) (same); Perry, 460 U.S. at 48 (same). Therefore, when school newspapers and yearbooks publish advertising alongside student articles and pictures, it cannot be said that editors are necessarily intending to open a forum for all public discourse.

This Circuit has observed that "in determining whether the government qua proprietor has designated public property to be a public forum, courts should be highly deferential to the government's decisions to regulate speech" where those decisions do not evidence viewpoint discrimination. AIDS Action Committee of Mass. v. MBTA, 42 F.3d 1, 9 (1st Cir. 1994). It follows that the mere absence of a prior written policy against political and public issue advertising should not preclude the Musket from adopting such a policy when the need to do so becomes apparent, so long as the paper has not established a practice of publishing such material. See Cornelius, 473 U.S.

at 802 (government's intent regarding a forum for speech must be gleaned from policy and practice) ; Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. No. 5, 941 F.2d 45, 47 (1st Cir. 1991) (same). In this case, the Musket had not published political or public issue advertising in the past, and Yeo's request did not obligate the paper to begin publishing such material.

When the state solicits advertising for a nontraditional public forum, it is permitted to filter out pure political speech. See Lehman, 418 U.S. at 303-04. Disallowing this filter would shut down potentially robust activities, including many ***256** school newspapers, inhibiting the marketplace of ideas protected by the First Amendment. See Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (recognizing that schools are important loci of the "marketplace of ideas" protected by the First Amendment) While it is true that "[t]he line between ideological and nonideological speech is impossible to draw with accuracy," Lehman, 418 U.S. at 319 (1974) (Brennan, J., dissenting), there is no such line-drawing problem in this case. For this additional reason, the district court must be affirmed.

Stahl, Circuit Judge, concurring in the judgment. Though I remain persuaded that, on the facts of this case, the student editors were public actors acting under color of state law, further examination of the record during en banc review leads me to conclude that this issue is not material to our decision and that the district court properly entered judgment in favor of defendants. I write separately for two reasons. First, because this case is easily resolved on statutory grounds -- lack of evidence from which a factfinder could conclude that the defendants "caused" the constitutional violation complained of -- I believe the majority's central state action ruling

to be an unfortunate breach of the "fundamental rule of judicial restraint . . . that [courts] will not reach constitutional questions in advance of the necessity of deciding them." Three Affiliated Tribes v. Wold Engineering, P.C., 467 U.S. 138, 157 (1984). Second, I believe the majority's unnecessary constitutional ruling to be wrong on the merits.

I.

Defendants cannot be liable to plaintiff for damages unless, among other things, they subjected plaintiff to, or caused plaintiff to be subjected to, a deprivation of federal rights. See 42 U.S.C. § 1983. Because the Supreme Court has made it clear that § 1983's causation language is to be narrowly construed, see Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 691-94 (1978) (interpreting the language of § 1983 to preclude the imposition of vicarious liability), the question here quickly reduces to whether one or more defendants can, at the least, be seen as having caused the rejection of the advertisements within the narrow meaning of the statute. See id.

As the majority notes, plaintiff has not named as defendants those persons -- the student editors of the newspaper and yearbook -- who may most readily be seen as having directly subjected him to the alleged deprivation of his First Amendment and equal protection rights. Nor has plaintiff argued that the acts and omissions for which the named defendants may most readily be seen as responsible delegating decision-making authority to the students and failing to override the students, decisions -- caused him to be subjected to constitutional harm. See, e.g., Febus-Rodriguez v. Betancourt-Lebon, 14 F.3d 87, 91-92 & n.4 (1st Cir. 1994) (discussing this circuit's standard

for establishing supervisory liability under § 1983). As a result, no trial is warranted unless there is a genuine issue of material fact as to whether (1) at least one individual defendant actually colluded with the students in the decisions to reject the advertisements; or (2) the rejection was pursuant to a policy or custom of the Town of Lexington. See, e.g., Board of County Commissioners v. Brown, 117 S. Ct. 1382, 1388 (1997) (reiterating that, for purposes of 1983, a municipality causes one to be subjected to a deprivation of federal rights only through its duly-enacted policies or widespread customs having the force of law). In my view, there is insufficient evidence to warrant a trial against any of the named defendants under either of these theories.

Though I continue to disagree with the majority's conclusion that defendants Kafrissen and Mechem did not influence the students' decisions to reject the advertisements, I now concur that the summary judgment record permits only one inference: the students made the ultimate decisions. In the end, I am constrained to agree that, in the face of largely uncontradicted testimony to ***257** contrary effect, Kafrissen and Mechem's use of the term "we" in message-relaying correspondence with plaintiff, and Kafrissen's prior threat to resign, see ante at 28 n.9, do not allow a determination that defendants Kafrissen or Mechem can be held liable for the decisions made. And with respect to the other individually-named defendants, so also do I agree that there is no basis for concluding that they participated in the rejections of the advertisements. Thus, there is insufficient evidence of statutory causation for plaintiff to proceed to trial against any of the individual defendants.

With respect to the Town, I agree with the majority's conclusion that there is no basis for attributing to it the conduct of the students. See ante Part III, Sections A and C. I take issue,

though, with the method by which the majority reaches its conclusion. Specifically, I disagree with its direct (though reverse) application to this case of those Supreme Court state action cases which look for state action in private conduct. See generally id. (applying, in order, Terry v. Adams, 345 U.S. 461 (1953); Morse v. Republican Party of Virginia, 116 S. Ct. 1186 (1996); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); and Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991), to determine that the defendants to this lawsuit, all of whom are public actors, are not liable for the students' conduct)? While these cases might, by analogy, shed light on what will not be considered constitutionally tortious municipal conduct under § 1983, see, e.g., Rendell-Baker, 457 U.S. at 840-41 (strongly supporting an argument that neither municipal funding nor municipal regulation of a private entity constitutes municipal "policy" for purposes of § 1983), not one of them speaks to the question directly posed here: can conduct by non-legislative and non-policy making actors be deemed to have been sufficiently caused by municipal policy or custom for liability to attach to the Town? Nor does any one of these cases involve harm-causing conduct which can be seen as having been committed by public actors. For these reasons, I fear that the majority opinion confuses more than it clarifies.

Moreover, the majority has entered an area it could and should avoid. The Town's freedom from liability flows less from the fact (if it be fact, see infra Part II) that the students are private actors than from the fact that the students' actions were not caused by Town policy or custom. Again, plaintiff has not advanced as a theory of liability the Town's decision

to let the students decide the only municipal policy or custom which can arguably be seen at play here. And even if plaintiff had so argued, it seems obvious that, as an action taken in what appears to have been good faith reliance upon state law, see Mass. Gen. L. c. 71, § 82, this policy cannot give rise to municipal liability under § 1983. See Surplus Store & Exchange, Inc. v. City of Delphi, 928 F.2d 788, 791-92 (7th Cir. 1991).

In the end, defendants are entitled to judgment because they did not, under § 1983, ultimately cause the conduct of the non-party students. We should not go beyond this simple fact to decide the case.

II.

By resolving this dispute through application of those cases which look for state action in private conduct, the majority proceeds from the premise that the students were private actors. I not only find this implicit holding to be unnecessary, I believe it to be incorrect on the merits. In my view, had plaintiff sued the student editors directly, we would have been obliged to rule that they were, in fact, public actors insofar as they solicited and published advertisements from paying third parties.

Whether a person or entity is a private or a public actor obviously cannot be resolved through application of cases which presume that the actor is private; it is resolved by a fact-specific inquiry into whether the person or entity is, in context, acting "under color of ***258** state law." See Polk County v. Dodson, 454 U.S. 312, 322 n.12 (1981) (noting the distinction). Although the Supreme Court has sometimes stated that the state action and under color of state law questions are co-

extensive, see, e.g., United States v. Price, 383 U.S. 787, 794 and n.7 (1966), it also has recognized that they are not invariably the same. That the inquiries sometimes diverge is clear in Dodson where, without reference to a single state action case, the Court concluded that a state public defender does not act under color of state law while acting as counsel to an indigent defendant in a state criminal proceeding. 454 U.S. at 320-24.

Here, as in Dodson, the question (had plaintiff raised it) would not have been whether private conduct should be attributed to the Town; rather, it would have been whether the conduct was, as an initial matter, public or private. Cf. Blum v. Yaretsky, 457 U.S 991, 1003-4 (1982) (contrasting "those cases in which the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the State so at to make it 'state' action for purposes of the Fourteenth Amendment" with "cases in which the challenged conduct consists of enforcement of state laws or regulations by state officials who are themselves parties in the lawsuit"). And the state action tests the majority relies upon, designed as they are to determine whether private conduct is attributable to the state, would not have helped answer the question.

To illustrate, when an on-duty municipal police officer misuses the power of the office to carry out a personal vendetta, we do not decide whether he was acting under color of state law by reference to whether the municipality is itself liable for the conduct. See, e.g., Martinez v. Colon, 54 F.3d 980 (1st Cir.), cert. denied, 116 S. Ct. 515 (1995). We decide it on a more contextually-appropriate inquiry into whether the officer has "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" Id. at 986 (quoting West v. Atkins, 487 U.S. 42, 49 (1988). So here should we decide whether the

students are public or private actors by reference to criteria other than those we would use to decide whether the Town must pay for the students' acts.

What criteria should be used? A helpful starting point is Dodson, where the Court's ruling was informed by two primary considerations: (1) "a public defender is not amenable to administrative direction in the same sense as other employees of the State," 454 U.S. at 321; and (2) "it is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages," id. at 321-22. Here, both factors militate in favor of finding that, insofar as they solicited and published (or declined to publish) advertisements from paying third parties, the students acted under color of state law. Certainly, the power of school officials to regulate the content of student publications and the acts of their student editors, see Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266-70 (1988), is near its apex where the subject of the regulation involves the students' commercial interactions with third parties. And where these interactions arguably implicate the constitutional rights of those third parties, cf. Dodson, 454 U.S. at 321-22, and hold out the prospect of monetary benefit to the Town, see, e.g., Burton, 365 U.S. at 724 (indicating that conduct which leads to monetary benefits for the State will often be deemed action on behalf of the State), the question is less whether the students may be regulated and more whether the students must be regulated.

My position is narrow. I have never doubted that the student writers are private actors with respect to reporting and editorializing. A contrary holding would, after all, effectively spell the end of public school student publications; one would be hard-pressed to report and could never editorialize without violating the First Amendment's mandate of viewpoint neu-

trality. See generally *259 R.A.V. v. City of St. Paul., 504 U.S. 377 (1992). I only suggest that, to the extent public school students solicit funds to support a public enterprise in their capacities as officials of that enterprise, they act under color of state law. See Dodson, 454 U.S. at 324-25 (making clear that an actor can act under color of state law in one capacity but not in another); see also ante at 36.

At the very least, that the students are private actors is not such an open and shut matter that it should be assumed sub silentio. If the student editors of the Musket determined to run the paid political advertisements of Democratic candidates for Town office but not those of Republican candidates, and if the Republican candidates sought injunctive relief against the students in their capacities as editors of the Musket, would we summarily conclude that the challenged action was not undertaken under color of state law? I would like to think not. Though the facts of the present case are less egregious, the underlying question not presented here because of plaintiff's pleading decisions is the same.

III.

For the reasons stated, I concur in the majority's conclusion that judgment was properly entered in favor of defendants. I do not, however, concur in the reasoning that leads it to this conclusion. I would instead resolve the case under well settled law that precludes a finding, under § 1983, against any of the defendants named in the complaint for the theories of recovery plaintiff has advanced.